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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 465

J. S. WOODS, PETITIONER,

vs.

INTERSTATE REALTY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 15, 1948.

CERTIORARI GRANTED FEBRUARY 7, 1949.

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SECOND AMENDED COMPLAINT.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE NORTHERN DISTRICT OF MISSISSIPPI.

No. 272-Civil.

INTERSTATE REALTY COMPANY,

Complainant,

versus

J. S. WOODS.

To Honorable Allen Cox, United States District Judge:

Comes Interstate Realty Company, a corporation, by leave of Court first obtained, and files this Second Amended Complaint against J. S. Woods and shows unto the Court as follows:

Count No. 1.

1.

Complainant is a corporation organized and existing under and by virtue of the laws of the State of Tennessee and having its domicile and principal place of business in Memphis, Shelby County, Tennessee. Complainant is engaged in the business of concluding sales of real estate and has been so engaged for a number of years.

2.

Defendant J. S. Woods is a resident citizen of the First Court District of Panola County, Mississippi, in the Western Division of the Northern District of Mississippi.

3.

Complainant and Defendant are citizens and residents of different States and there is involved in this suit more than Three Thousand Dollars ($3,000.00) exclusive of interest and costs.

4.

This is a suit for a real estate brokers' commission and involves the following land situated in the Second Court District of Panola County, Mississippi in the Western Division of the Northern District of Mississippi, and described as follows:

A fraction of the Southeast Quarter (SE) South of Tallahatchie River of Section Twenty-three (23) Township Eight (8), Range Seven (7), 50 acres more or less; a fraction of the Southwest Quarter (SW¼) and a fraction of the Northwest Quarter (NW¼) and a fraction of the Southeast Quarter (SE¼) of Section Twenty-four (24), Township Eight (8), Range Seven (7), 228 acres, more or less; the North One-half (N½) of the Southwest Quarter (SW¼) of Section Twenty-five (25), Township Eight (8), Range Seven (7), 480 acres, more or less; a fraction of the East One-half (E½) of Section Twenty-six (26) Township Eight (8), Range Seven (7), 120 acres, more or less; being all located in the Second Court District of Panola County, Mississippi.

5.

During the years of 1944 and 1945 Defendant J. S. Woods was the owner of the land described in paragraph No. 4 above.

6.

During the year of 1944 Complainant, through its agent Charles W. Partee, worked on the sale of the property of Defendant above described, went to a good deal of expense advertising said property and to a great deal of traveling expense showing said property to prospective buyers. This was done with the knowledge of Defendant and with his consent and cooperation. Defendant knew and thoroughly understood that Complainant was to receive a commission of Five per cent of the total amount of the sale price of the property above described.

7.

Later one L. A. Conolly and United Service and Research, Inc., had listed with them by Defendant the property above described and L. A. Conolly and United Service and Research, Inc., spent a great deal of time and money advertising said property and showing it to prospective buyers. This was done with the knowledge of Defendant and with his consent and cooperation. Defendant knew and understood that during said time, L. A. Conolly and United Service and Research, Inc., were to receive a commission of five per cent of the total sale price of said property if they succeeded in finding a buyer for said property at the price and on the terms set out in the agreement between them and Defendant.

8.

When the sole agency held by United Service and Research, Inc., for the sale of said property expired in 1945 Defendant called Charles W. Partee, the agent of Complainant, over the telephone and advised him, Partee, that he, Partee, could again get busy and sell the above de-

scribed property. Partee, as the agent of Complainant immediately began advertising said property and working to find a buyer for said property. After Partee, as the agent of Complainant, had worked on the sale of said property for several weeks the above named L. A. Conolly notified Partee that he, Conolly, had a prospective buyer for the property above described, such prospective buyer being one Carl A. McCown. In fact said Carl A. McCown signed a Contract with United Service and Research, Inc., of which the said L. A. Conolly was the agent. A copy of said Contract is hereto attached as Exhibit No. 1 to this Second Amended Complaint and is hereby made a part of same as much as if set out in full herein.

9.

The said Charles W. Partee had been previously employed by Complainant on a general agreement for his full time services, under which agreement Complainant was to receive a certain definite per cent of the commission earned on all sales concluded as the result of the agency of said Charles W. Partee, the said Charles W. Partee, as agent, to receive the balance of such commission. In this particular instance and for this particular transaction it was agreed that Complainant, under the Contract which he had with Defendant, would receive twenty per cent of the commission of said sale if concluded and would pay to said Charles W. Partee thirty per cent of said commission; would pay to said L. A. Conolly twenty-five per cent of said commission; and would pay to said United Service and Research, Inc., twenty-five per cent of said commission.

10.

On November 3, 1945, Defendant entered into a Contract with Complainant at Memphis, Tennessee, for the

sale of the property above described at a price of Sixty-nine Thousand Dollars ($69,000.00). Of this amount Five Thousand Dollars ($5,000.00) was to be paid in cash as earnest money and in part payment; Fourteen Thousand Dollars ($14,000.00) was to be paid in cash at the closing of the sale; Fifty Thousand Dollars ($50,000.00) was to be paid in the following amounts: Four Thousand Dollars ($4,000.00) on or before the date of the Deed from Defendants to said Carl A. McCown; Four Thousand Dollars ($4,000.00) on or before two years from the date of said Deed and fourteen annual payments of Three Thousand Dollars ($3,000.00) each, the first of said last mentioned payments to be due on or before three years from the date of said Deed and one of said payments to be due each year thereafter until all were paid. All of said payments were to bear interest at the rate of four per cent per annum. By the terms of said Contract Defendant was to pay Complainant a commission of Five per cent of the total purchase price of said property or the amount of Three Thousand Four Hundred and Fifty Dollars ($3,450.00). A copy of said contract is hereto attached as Exhibit No. 2 to this Second Amended Complaint and is hereby made a part of same as much as if set out in full herein. This is the Contract for the breach of which the action in this Count is based.

11.

Prior to the execution of this written Contract and up to November 20, 1945, Complainant, through its agents continued to work on the sale to said Carl A. McCown in the attempt to carry out the Contract which has been made Exhibit No. 2 hereto and went to considerable expense and spent considerable time in their efforts. In the attempt to conclude the sale Complainant, through its agents above named, offered to Defendant the farm

of Carl A. McCown as security for Nine Thousand Dollars ($9,000.00) of the cash payment demanded by Defendant. All other terms of the proposed trade were the same as set out in the Contract which has been made Exhibit No. 2 hereto. This last Contract was to expire on November 20, 1945. Thereupon Complainant, through its agents above named, asked Defendant to give them four or five more days after November 20, 1945, to enable McCown, their prospective buyer, to raise the additional Nine Thousand Dollars ($9,000.00) in cash necessary to close the sale of the above described property of Defendant on the terms above set out. Defendant refused to grant this additional time and stated that he was unwilling to deal any further with said McCown. This was in spite of the fact that Complainant, through its agents as above set out, had furnished Defendant with a buyer ready, willing and able to buy on terms satisfactory to Defendant.

12.

On November 27, 1945, just seven days after the date of the expiration of the Contract sued on in this Count, Defendant and McCown closed a Contract for the sale of the above described property of Defendant. A copy of this agreement is hereto attached as Exhibit No. 3 to this Second Amended Complaint and is hereby made a part of same as much as if set out in full herein.

13.

On January 1, 1946, Defendant conveyed by Warranty Deed the property herein involved to said Carl A. McCown. The consideration for this Deed was a total sale price of Sixty-seven Thousand Two Hundred and Seventy-five Dollars ($67,275.00); a cash payment of Thirteen

Thousand Two Hundred and Seventy-five Dollars ($13,275.00); the balance of Fifty-four Thousand Dollars ($54,000.00) with four per cent interest per annum from January 1, 1946, being evidenced by note of Two Thousand Five Hundred Dollars ($2,500.00) due on or before January 1, 1947; note of Two Thousand Five Hundred Dollars ($2,500.00) due on or before January 1, 1948, eleven notes of Four Thousand Dollars ($4,000.00) each, one of said notes being due on or before January 1st of each year, beginning January 1, 1949, and one note of Five Thousand Dollars ($5,000.00) due on January 1, 1960. Possession of the property herein involved was to be given to said McCown January 1, 1946. Defendant was to pay the 1945 taxes on said property and to receive the crop on said land for the year 1945. The deferred payments were secured by a vendor's lien and by Purchase Money Deed of Trust. A copy of said Deed is hereto attached as Exhibit No. 4 to this Second Amended Complant and is hereby made a part of same as much as if set out in full herein.

14.

In further consummation of said trade, on January 1, 1946, said Carl A. McCown and his wife Louise McCown, gave their certain Deed of Trust to John W. Kyle, Trustee for Defendant. A copy of said Deed of Trust is hereto attached as Exhibit No. 5 to this Second Amended Complaint and is hereby made a part of same as much as if set out in full herein.

15.

In addition to the above, on January 1, 1946, the said Carl A. McCown executed and delivered to John W. Kyle, Trustee for Defendant, an additional Deed of Trust for

the payment of certain of the deferred payments due under the above mentioned Deed. A copy of this Deed of Trust is hereto attached as Exhibit No. 6 and is hereby made a part of this Second Amended Complaint as much as if set out in full herein.

16.

The sale of said land from Defendants to said Carl A. McCown was made solely because of the services rendered by Complainant, through its above named agents, and such services were rendered with the full knowledge of Defendant and with his consent.

17.

Although requested so to do, Defendant has refused to pay to Complainant said commission of Three Thousand Four Hundred and Fifty Dollars ($3,450.00) or any part thereof.

18.

Defendant is indebted to Complainant for the payment of said commission of Three Thousand Four Hundred Fifty Dollars ($3,450.00) together with six per cent interest thereon from November 27, 1945, until paid.

19.

Wherefore Complainant demands Judgment of Defendant for said sum of Three Thousand Four Hundred and Fifty Dollars ($3,450.00) with six per cent interest thereon from November 26, 1945, until paid. Complainant also asks for a jury for the trial of this suit.

Count No. 2.

1.

Complainant is a corporation organized and existing under and by virtue of the laws of the State of Tennessee and having its domicile and principal place of business in Memphis, Shelby County, Tennessee. Complainant is engaged in the business of concluding sales of real estate and has been so engaged for a number of years.

2.

Defendant J. S. Woods is a resident citizen of the First Court District of Panola County, Mississippi, in the Western Division of the Northern District of Mississippi.

3.

Complainant and Defendant are citizens and residents of different States and there is involved in this suit more than Three Thousand Dollars ($3,000.00), exclusive of interest and costs.

4.

This is a suit for a real estate brokers' commission and involves the following land situated in the Second Court District of Panola County, Mississippi in the Western Division of the Northern District of Mississippi, and described as follows:

A fraction of the Southeast Quarter (SE¼) South of Tallahatchie River of Section Twenty-three (23) Township Eight (8), Range Seven (7), 50 acres more or less; a fraction of the Southwest Quarter (SW¼) and a frac-

tion of the Northwest Quarter ($NW^1/_4$) and a fraction of the Southeast Quarter ($SE^1/_4$) of Section Twenty-four (24), Township Eight (8), Range Seven (7), 228 acres, more or less; the North One-half ($N^1/_2$) of the Southwest Quarter ($SW^1/_4$) of Section Twenty-five (25), Township Eight (8), Range Seven (7), 480 acres, more or less; a fraction of the East One-half ($E^1/_2$) of Section Twenty-six (26), Township Eight (8), Range Seven (7), 120 acres, more or less; being all located in the Second Court District of Panola County, Mississippi.

5.

During the years of 1944 and 1945 Defendant J. S. Woods was the owner of the land described in paragraph No. 4 above.

6.

During the year of 1944 Complainant, through its agent Charles W. Partee, worked on the sale of the property of Defendant above described, went to a good deal of expense advertising said property and to a great deal of traveling expense showing said property to prospective buyers. This was done with the knowledge of Defendant and with his consent and cooperation. Defendant knew and thoroughly understood that it was usual and customary for a real estate broker under such circumstances to receive a commission of five per cent of the total sale price of the real estate sold.

7.

Later one L. A. Conolly and United Service and Research, Inc., had listed with them by Defendant the property above described and L. A. Conolly and United Serv-

ice and Research, Inc., spent a great deal of time and money advertising said property and showing it to prospective buyers. This was done with the knowledge of Defendant and with his consent and cooperation. Defendant knew and thoroughly understood that it was usual and customary for a real estate broker under such circumstances to receive a commission of five per cent of the total sale price of the real estate sold.

8.

When the sole agency held by United Service and Research, Inc., for the sale of said property expired in 1945 Defendant called Charles W. Partee, the agent of Complainant, over the telephone and advised him, Partee, that he, Partee, could again get busy to sell the above described property. Partee, as the agent of Complainant immediately began advertising said property and working to find a buyer for said property. After Partee, as the agent of Complainant, had worked on the sale of said property for several weeks the above named L. A. Conolly notified Partee that he, Conolly, had a prospective buyer for the property above described, such prospective buyer being one Carl A. McCown. In fact said Carl A. McCown signed a Contract with United Service and Research, Inc., of which the said L. A. Conolly was the agent. A copy of said Contract has already been made Exhibit No. 1 to this Second Amended Complaint and is hereby made an exhibit to this Count by reference as much as if set out in full herein.

9.

The said Charles W. Partee had been previously employed by Complainant on a general agreement for his full time services, under which agreement Complainant

was to receive a certain definite per cent of the commission earned on all sales concluded as the result of the agency of said Charles W. Partee, the said Charles W. Partee, as agent, to receive the balance of such commission. In this particular instance and for this particular transaction it was agreed that Complainant, under the Contract which it had with Defendant, would receive twenty per cent of the commission on said sale if concluded and would pay to said Charles W. Partee thirty per cent of said commission; would pay to said L. A. Conolly twenty-five per cent of said commission; and would pay to said United Service and Research, Inc., twenty-five per cent of said commission.

10.

On November 3, 1945, Defendant entered into a Contract with Complainant at Memphis, Tennessee, for the sale of the property above described at a price of Sixty-nine Thousand Dollars ($69,000.00). Of this amount Five Thousand Dollars ($5,000.00) was to be paid in cash as earnest money and in part payment; Fourteen Thousand Dollars ($14,000.00) was to be paid in cash at the closing of the sale; Fifty Thousand Dollars ($50,000.00) was to be paid in the following amounts: Four Thousand Dollarc ($4,000.00) on or before the date of the Deed from Defendant to said Carl A. McCown; Four Thousand Dollars ($4,000.00) on or before two years from the date of said Deed and fourteen annual payments of Three Thousand Dollars ($3,000.00) each, the first of said last mentioned payments to be due on or before three years from the date of said Deed and one of said payments to be due each year thereafter until all were paid. All of said payments were to bear interest at the rate of four per cent per annum. By the terms of said Contract Defendant was to pay Complainant a commission of Five per cent of the

total purchase price of said property or the amount of Three Thousand Four Hundred and Fifty Dollars ($3,450.00). A copy of said Contract has already been made Exhibit No. 2 to this Second Amended Complaint and is hereby made an Exhibit to this Count by reference as much as if set out in full herein.

11.

Prior to the execution of this written Contract and up to November 20, 1945, Complainant, through its agents continued to work on the sale to said Carl A. McCown in the attempt to carry out the Contract which has been made Exhibit No. 2 hereto and went to considerable expense and spent considerable time in their efforts. In the attempt to conclude the sale Complainant, through its agents above named, offered to Defendant the farm of Carl A. McCown as security for Nine Thousand Dollars ($9,000.00) of the cash payment demanded by Defendant. All other terms of the proposed trade were the same as set out in the Contract which has been made Exhibit No. 2 hereto. This last Contract was to expire on November 20, 1945. Thereupon Complainant, through its agents above named, asked Defendant to give them four or five more days after November 20, 1945, to enable McCown, their prospective buyers, to raise the additional Nine Thousand Dollars ($9,000.00) in cash necessary to close the sale of the above described property of Defendant on the terms above set out. Defendant refused to grant this additional time and stated that he was unwilling to deal any further with said McCown. This was in spite of the fact that Complainant, through its agents as above set out, had furnished Defendant with a buyer ready, willing and able to buy on terms satisfactory to Defendant.

12.

On November 27, 1945, just seven days after the date of the expiration of the Contract sued on in this Count, Defendant and McCown closed a Contract for the sale of the above described property of Defendant. A copy of this Agreement has already been made Exhibit No. 3 to this Second Amended Complaint and is hereby made an Exhibit to this Count by reference as much as if set out in full herein.

13.

On January 1, 1946, Defendant conveyed by Warranty Deed the property herein involved to said Carl A. McCown. The consideration for this Deed was a total sale price of Sixty-seven Thousand Two Hundred and Seventy-five Dollars ($67,275.00); a cash payment of Thirteen Thousand Two Hundred and Seventy-five Dollars ($13,275.00); the balance of Fifty-four Thousand Dollars ($54,000.00) with four per cent interest per annum from January 1, 1946, being evidenced by note of Two Thousand Five Hundred Dollars ($2,500.00) due on or before January 1, 1947; note of Two Thousand Five Hundred Dollars ($2,500.00) due on or before January 1, 1948, eleven notes of Four Thousand Dollars ($4,000.00) each, one of said notes being due on or before January 1st of each year, beginning January 1, 1949, and one note of Five Thousand Dollars ($5,000.00) due on January 1, 1960. Possession of the property herein involved was to be given to said McCown January 1, 1946. Defendant was to pay the 1945 taxes on said property and to receive the crop on said land for the year 1945. The deferred payments were secured by a vendor's lien and by Purchase Money Deed of Trust. A copy of said Deed has already been made Exhibit No. 4 to this Second Amended Complaint

and is hereby made an Exhibit to this Count by reference as much as if set out in full herein.

14.

In further consummation of said trade, on January 1, 1946, said Carl A. McCown and his wife Louise McCown, gave their certain Deed of Trust to John W. Kyle, Trustee for Defendant. A copy of said Deed of Trust has already been made Exhibit No. 5 to this Second Amended Complaint and is hereby made an Exhibit to this Count by reference as much as if set out in full herein.

15.

In addition to the above, on January 1, 1946, said Carl A. McCown executed and delivered to John W. Kyle, Trustee for Defendant, an additional Deed of Trust for the payment of certain of the deferred payments due under the above mentioned Deed. A copy of this Deed of Trust has already been made Exhibit No. 6 to this Second Amended Complaint and is hereby made an Exhibit to this Count by reference as much as if set out in full herein.

16.

The sale of said land from Defendant to said Carl A. McCown was made solely because of the services rendered by Complainant, through its above named agents, and such services were rendered with the full knowledge of Defendant and with his consent. The reasonable value of the services performed by Complainant, through its agents, in the sale of said land was Three Thousand Four Hundred and Fifty Dollars ($3,450.00).

17.

Although requested so to do, Defendant has refused to pay to Complainant said commission of Three Thousand Four Hundred and Fifty Dollars ($3,450.00) or any part thereof.

18.

Defendant is indebted to Complainant for the payment of said commission of Three Thousand Four Hundred and Fifty Dollars ($3,450.00) together with six per cent interest thereon from November 27, 1945, until paid.

19.

Wherefore Complainant demands Judgment of Defendant for said sum of Three Thousand Four Hundred and Fifty Dollars ($3,450.00) with six per cent interest thereon from November 26, 1945, until paid. Complainant also asks for a jury for the trial of this suit.

(Signed) L. C. ANDREWS,
(L. C. Andrews)

Oxford, Mississippi.

JAMES STONE & SONS,
(Signed) By PHIL STONE,
(Phil Stone)
Attorneys for Complainant.

Oxford, Mississippi.

14 CERTIFICATE.

I, Phil Stone, of the firm of James Stone & Sons, of counsel for Complainant, do hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing Second Amended Complaint to McClure & Fant and to John W. Kyle, Attorneys for Defendant, at their usual post office addresses at Sardis, Mississipi.

This October 27, 1947.

(Signed) PHIL STONE,
(Phil Stone)
Of Counsel for Complainant.

Oxford, Mississippi.

EXHIBIT No. 1 TO SECOND AMENDED COMPLAINT.

United Service and Research, Inc.,
Realtors 81 Madison Bldg.,
Memphis, Tenn.

Memphis, Tenn., November 1st, 1945.

Received of Carl A. McCown the sum of Two Thousand Dollars as earnest money and in part payment of the following described real estate, situated in Panola County, Mississippi together with all improvements and appurtenances thereon, to-wit:

Being all the land now owned by the seller in section 23, 24, 25 and 26 Township 3 S. Range 7 W. or in any adjoining section. All tools, implements, and equipment as per list attached. Also 1 truck, 1 John Deere Tractor together with all tractor equipment. 1 Letz Mill and attachments. Also 3000 lbs. cotton seed.

which we have this day sold and agree to convey to Carl A. McCown or his order and which he agrees to purchase for the sum of Exchange of property upon the term and conditions as follows:

Purchaser to convey 200 acres of land located in Panola County and described as follows: Section 32 T-8 Range 7.

Cash of $2,000.00 and 20 notes of $2,100.00 each due and payable on January 1st, 1947, to and including January 1st, 1967 with interest at 4% per annum. Interest payable annually on Entire unpaid balance. Notes payable on or before. Notes to be secured with Deed of Trust on above described land.

Both Purchaser and Seller to retain this year's crops. Both Purchaser and Seller to pay 1945 taxes on their respective properties. Possession to be given on each property on or before January 1st, 1945.

Deferred payments to be evidenced by notes and secured by a Truste Deed Mortgage on the premises. Settlement and payment of balance of said cash payment to be paid upon presentation of a good and valid warranty deed with the usual covenants and conveying a good and merchantable title, after allowing 10 days from delivery of abstracts for the examination of title. Seller agree to furnish promptly necessary abstracts of title, for examination only. It is hereby agreed by both parties that in the event of a controversy regarding title a Guarantee Policy issued by Commerce Title Guaranty Co. or the Union Planters Title Guaranty Co. for the purchase price herein stipulated covering this property shall constitute and be accepted by purchaser as conclusive evidence of a good and merchantable title.

Possession is to be given on or before January 1st, 1945. This contract is subject to a none lease expiring ..... and subject to the rights of tenants. Rents and expenses are to be prorated as of closing date. Insurance to be prorated as of closing date. Taxes for the current year to be paid by seller. The seller agrees to pay any prior unpaid taxes or liens, including front foot assessment, on the property he convey. The improvements on this land are to be delivered in as good condition as they are of the date of this contract, ordinary wear and tear excepted; and if not in such condition when final delivery is offered, the seller is obligated to put them in such condition.

It is understood and agreed that if the title is not good and can not be made good within a reasonable time after written notice is given to seller that title is defective, specifically pointing out the defects, then this earnest money, which has been deposited with the undersigned agent, is to be returned to the purchaser and the usual commission is to be paid the agent by the seller. If the title is good and the property is not paid for as herein specified, this earnest money is to be forfeited, and the undersigned agent is authorized to deduct therefrom its commission, the surplus, if any, to be paid to the seller. It is expressly understood and agreed, however, by both parties hereto that such forfeiture shall in no way affect the right of either party to enforce the specific performance of this contract. The seller agrees to pay to the undersigned agent the usual commission as established by the Real Estate Board of Memphis.

It is agreed that the above described property is sold subject to restrictions of record and existing easements, if any.

It is expressly understood and agreed between the parties hereto that this contract as signed by them constitutes the sole and entire agreement by them, and no modification of this contract shall be binding upon either party, unless in writing; signed by them, and attached hereto; and no representation, statement, or inducement, except as herein noted, shall be binding upon either party or agent.

Witness the signature of all parties the day and year above written.

We acknowledge receipt of the above mentioned earnest money and hold same subject to the terms of this contract.

(Signature torn off.)

.....

Agents.

.....

Executed in .....

EXHIBIT No. 2 TO SECOND AMENDED COMPLAINT.

17

Executed in Triplicate.

Phones 6-5234, 6-5225.

Interstate Realty Company,
107 Madison Ave., at Main Street,
Memphis, Tenn.

Contract for Sale of Real Estate.

Memphis, Tenn., November 3, 1945.

Received of The Undersigned Purchaser the sum of Five Thousand & No/100 ($5000.00) Dollars as earnest

money and in part payment for the following described lands, with all improvements thereon, situate in the County of Panola and State of Mississippi, to-wit:

Plantation property, known as the J. S. Woods place, on old Highway 51, approximately 3½ miles east of the town of Batesville on the road to Sardis Lake and bounded on the north by Tallahatchie River, and containing, according to Deed, approximately 901 acres, more or less, together with all improvements thereon; and also the following personal property:

1 Power Hay Baler
2 Horse drawn mowing machines
1 Hay Rake (horse drawn)
1 4-Mule Disc
3 Vulcan new ground plows
2 Heavy new ground harrows
2 Heavy section harrows
4 2-Horse break plows
1 Tractor stalk cutter
2 Horse drawn stalk cutters
3 Middle busters
12 1-Horse top harrows
7 Combination planters (corn & cotton)
45 Cultivaters (one horse)
5 Fertilizer distributors
42 One-horse turn plows
42 Coldwater iron shovel stocks
9 Double Shovels
75 Cotton hoes
4 2-Horse wagons
42 Sets plow gear
2 Sets wagon harness
1 Blacksmith shop, complete with tools
1 Outfit for putting down wells

1 Spray barrel & pump
2 Saddle gun boll weevil & worm spray outfits
Fertilizer forks, corn scoops, saw, wedges and axes
1 Farm saddle & bridle
3 Road slips
1 Road drag
1 Martin ditching machine
1 John Deere tractor, with all tractor equipment belonging to same
1 Letz feed mill, with all attachments belonging to same

which I have this day sold and agreed to convey by warranty deed to The Undersigned Purchaser or any other designated grantee, for the total price of Sixty-Nine Thousand & No/100 Dollars ($69,000.00) upon terms as follows:

$19,000.00 cash on delivery of good and sufficient Warranty Deed; the balance of said purchase price, amounting to $50,000.00 is to be payable $4,000.00 on or before one year from date of Deed, $4,000.00 on or before two years from date of Deed, and the remaining part of said purchase price, amounting to $42,000.00, is to be payable in 14 annual payments of $3,000.00 each, the first of said payments being due on or before three years from date of Deed, and one of said payments each year thereafter until all are paid. All of said deferred payments are to be payable on or before maturity and are to draw interest at four per cent (4%) per annum, the interest payable annually.

Possession of said property to be given on or before January 1, 1946, the seller retaining the income from said property for the year 1945 and paying the taxes for the year 1945.

This contract is signed by the seller conditioned on the Interstate Realty Company, Agent in this transaction, securing a purchaser to execute this contract under the terms set out herein on or before November 20, 1945, after date.

Cash payment to be made upon presentation of good and sufficient warranty deed. Deferred payments to be evidenced by promissory notes, dated ....., and secured by purchase money mortgage deed of trust.

The vendor agrees to furnish complete abstract of title to said property; and the purchaser is allowed the period of 30 days from the delivery of such abstract for the examination of title. If the title is not good, and cannot be made good within 90 days after written notice specifying defects of title, then said earnest money is to be returned to the purchaser. But, if the purchaser defaults in the performance hereof on his part, then said earnest money is to be retained by Interstate Realty Company for the vendor and for application to the payment of its compensation for negotiating this contract. But such forfeiture shall in no wise affect the right of either party to enforce the specific performance of this agreement. Both parties hereto agree that the signing and delivery of this writing constitutes a sale, the purchaser having examined said property, and relying upon his own estimate of the value thereof, and the vendor accepting the purchaser, and agreeing to pay to Interstate Realty Company the compensation hereinafter specified for negotiating this contract. The validity of this contract is in no wise dependent upon the signature or agreement of any party not named herein.

Interstate Realty Company executes this contract solely in its capacity as agent, and may relieve itself from

liability hereunder by disclosing the name of its principal.

.....

Agent.

.....

Purchaser.

I agree to sell the afore-described real estate at the price and upon the terms hereinabove set forth, ratifying and confirming the foregoing contract, for the negotiation of which I agree to pay Interstate Realty Company the sum of $ 5% of purchase price, on the date when said contract in the usual course should be consummated, until which time the earnest money is to be retained by said Interstate Realty Company.

J. S. WOODS,
Vendor.

EXHIBIT No. 3 TO SECOND AMENDED COMPLANIT.

20 Agreement for Sale of Land.

This Agreement, Made and entered into this the 27th day of November, 1945, by and between J. S. Woods. hereinafter called the Vendor, and Carl A. McCown, hereinafter called the Purchaser, Witnesseth:

1. The said vendor hereby agrees to sell and convey to the said purchaser the farm lands known as the Potts Place, containing approximately 900 acres, now owned by the said vendor, and situated about 1½ miles southwest of Belmont Bridge, in the Second Court District of Panola County, Mississippi, for the sum of $67,275.00, of which the sum of $17,275.00 is to be paid in cash by said purchaser to said Vendor upon the delivery of a proper

deed of conveyance of said lands to said purchaser, and the balance is to be paid in fourteen annual installments in amounts and with maturities as follows, to-wit:

The sum of $2,500.00 is to become due and payable on January 1, 1947; and the sum of $2,500.00 is to become due and payable on January 1, 1948. And the sum of $3,750.00 is to become due and payable on the First Day of January of each of the years 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, and 1960.

Said deferred payments are to be evidenced by fourteen purchase money notes in amounts and with maturities as stated above; and all of said notes are to bear interest from January 1, 1946, until paid, at the rate of four per cent (4%) per annum, interest payable annually, on the First Day of January of each year; and all of said notes are to be secured by a vendor's lien and a first mortgage deed of trust on said land, in the usual form, with power of sale; and all of said notes shall provide for accelleration of payment of the principal thereof, at the option of the holder, if default be made in the payment of any of said notes, or any interest thereon, when due.

2. The said purchaser agrees to purchase the above described lands for the price hereinabove stated, and to pay to the said vendor the said sum of $17,275.00 in cash, upon the delivery to said purchaser of a proper deed of conveyance of said lands by the said vendor, and to execute and deliver to the said vendor at the same time the purchase money notes for the remaining $50,000.00 of said purchase price, in amounts and with maturities as stated above, and to execute and deliver to said vendor at the same time a mortgage deed of trust, with power of sale, in the usual form, to secure the payment of said unpaid balance of said purchase price, evidenced by said install-

ment notes. And it is expressly stipulated and agreed that Mrs. Louise McCown, the wife of said Carl McCown, shall join in the execution of said mortgage deed of trust. The notes evidencing the unpaid balance of said purchase price shall bear interest from January 1, 1946, until paid, at the rate of four per cent (4%) per annum, interest payable annually on the First Day of January of each year, as aforesaid; and all of said notes to provide for acceleration of payment of the principal thereof, at the option of the holder, if default be made in the payment of any of said notes, or any interest thereon, when due; and said notes shall provide for the payment of an attorney's fee, if placed in the hands of an attorney for collection after maturity.

3. The said vendor agrees to prepare, or to have prepared at his own expense, a proper deed of conveyance of said lands, conveying said lands to said purchaser, in fee simple, free and clear of all encumbrances, on January 1, 1946; and in said deed of conveyance the said vendor shall warrant the title to said lands to said purchaser, except as to taxes levied and assessed against said lands for the year 1946 and all succeeding years. The said purchaser shall pay the taxes levied and assessed against said lands for the year 1946. And said purchaser shall be entitled to possession of said lands from and after January 1, 1946.

4. The said purchaser has paid to the said vendor on the date of the signing of this Agreement the sum of $5,000.00 as earnest money to insure the prompt performance of this Agreement by said purchaser. And the said purchaser agrees to pay the remaining $12,275.00 of the cash payment to be made by said purchaser to said vendor on January 1, 1946, when the deed of conveyance is to be delivered to him by said vendor. In the event the

said purchaser shall promptly perform his contract to purchase said lands for the price and upon the terms hereinabove stated, said $5,000.00 earnest money shall be treated as a part payment of $17,275.00 cash payment to be made by the said purchaser under the terms of this Agreement. If, on the other hand, said purchaser fails to perform properly his contract and agreement to purchase said lands, as provided for in this Agreement, the said $5,000.00, thus paid as earnest money, shall be retained by the said vendor as liquidated damages for failure to carry out this Agreement on the part of said purchaser.

5. And for the consideration above stated the vendor agrees to sell and deliver to the said purchaser the following personal property now located on said lands and used in connection with the farming operations on said lands, viz.:

1 Power hay baler
2 mowing machines
1 hay rake
1 4-mule disc
3 Vulcan new ground plows
2 New ground harrows
2 Section harrows
4 2-horse break plows
1 tractor stalk cutter
2 Horse-drawn cutters
3 Middle-busters
12 Top harrows
7 Combination planters
45 Cultivators (1 horse)
5 Fertilizer distributors
42 1-horse turning plows
42 Iron shovel stocks

9 Double shovels
75 hoes
4 Wagons
42 Plow gear
2 Sets of wagon harness
1 Black-smith shop, complete
1 Outfit for putting down wells
1 Spray barrel and pump
2 Saddle gun spray outfits for weevil
Fertilizer forks, corn scoops, saw wedges and axes
1 Saddle and bridle
3 Road slips
1 Road drag
1 Martin ditching machine
1 Letz feed mill
1 2-row corn planter
1 John Deere tractor and equipment, consisting of tractor, middle-buster, disc and cultivating attachments.

The said purchaser agrees to execute and deliver to the said vendor a chattel mortgage deed of trust on the above described farm implements, machinery and equipment as additional security for the payment of the first $2,500.00 purchase money note becoming due January 1, 1947.

6. The said vendor agrees to sell to the said purchaser at such prices as may be agreed upon by said parties 25 or 30 mules now owned by said vendor; or, if said parties are unable to agree upon the price of said mules, the vendor agrees to lend to said purchaser a sufficient sum of money to enable said purchaser to purchase 25 or 30 head of mules elsewhere; provided, however that the amount of such loan shall not exceed $150.00 for each such mule purchased. The purchase price of said mules, or the money advanced by the vendor to enable the pur-

chaser to purchase said mules elsewhere, shall be evidenced by the promissory note of the purchaser, payable to the vendor, and becoming due and payable December 1, 1946, with interest thereon from the 1st day of January, 1946, until paid, at the rate of four per cent (4%) per annum, and shall be secured by a chattel mortgage deed of trust on said mules and all crops grown on the above described lands during the year 1946, and the above described farming implements, machinery and equipment.

7. The said vendor agrees to advance to said purchaser during the 1946 crop season the sum of $3,000.00, to be used by said purchaser to defray the expenses of planting, cultivating and gathering crops on the above described lands during the year 1946, and in making advancements to the share-croppers and other agricultural workers on said lands during the 1946 crop season to enable them to subsist and to plant, cultivate and gather their said crops. The said sum of $3,000.00 shall be advanced to the said purchaser in approximately equal monthly installments beginning March 1st, 1946; and the advancements thus made shall be evidenced by notes bearing interest from date until paid at the rate of six per cent (6%) per annum; and said indebtedness shall become due and payable on or before December 1, 1946; and the prompt payment of said indebtedness shall be secured by a mortgage deed of trust, which shall constitute a first lien, upon the crops to be grown on the above described lands during the year 1946, and by a mortgage deed of trust on the mules and the above described farming implements, machinery and equipment.

8. The said purchaser agrees to execute all necessary instruments required to carry out the provisions of paragraphs 5, 6 and 7 of the Agreement.

Witness our signature, this the 27th day of November, 1945.

(Signed) J. S. WOODS,
Vendor.
(Signed) CARL A. McCOWN,
Purchaser.

State of Mississippi,
Panola County.

Before me, the undersigned Notary Public in and for Panola County, in the State of Mississippi, duly commissioned, qualified and acting, this day personally appeared the above named J. S. Woods, who acknowledged that he signed and delivered the foregoing instrument on the day and year therein mentioned as his voluntary and deed and for the purposes and consideration therein stated.

Given under my hand and seal of office at Sardis, Mississippi, this the 27th day of November, 1945.

(Signed) ANNA MAYE GILLESPIE,
(Seal) Notary Public.

My Commission expires Feb. 2nd, 1948.

State of Mississippi,
Panola County.

Before me, the undersigned Notary Public in and for Panola County, in the State of Mississippi, duly commissioned, qualified and acting, this day personally appeared the above named Carl A. McCown, who acknowledged that he signed and delivered the foregoing instrument on the day and year therein mentioned as his voluntary act and deed and for the purposes and consideration therein stated.

Given under my hand and seal of office at Sardis, Mississipi, this the 27th day of November, 1945.

(Signed) ANNA MAYE GILLESPIE,
(Seal) Notary Public.

My Commission expires Feb. 2nd, 1948.

EXHIBIT No. 4 TO SECOND AMENDED COMPLAINT.

26 Deed of Conveyance.

J. S. Woods
to
Carl A. McCown.

State of Mississippi,
Panola County.

In Consideration of the sum of Sixty-Seven Thousand, Two Hundred and Seventy-Five Dollars ($67,275.00), of which the sum of $13,275.00 has been paid to me in cash by Carl A. McCown, the grantee herein, the receipt of which is hereby acknowledged, and the balance, namely, the sum of $54,000.00, is to be paid in fourteen annual installments in amounts and with dates of maturity as follows: The sum of $2,500.00 is to become due and payable on the First Day of January of each of the years 1947 and 1948, and the sum of $4,000.00 is to become due and payable on the First day of January of each of the years 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, and 1959, and the sum of $5,000.00 is to become due and payable on the First Day of January, 1960 —said unpaid balance of said purchase price being evidenced by fourteen promissory notes of even date herewith, in amounts and with dates of maturity as stated above, signed by the said Carl A. McCown, as maker, and

payable to the undersigned J. S. Woods, or his order, and all of said notes bearing interest from date until paid at the rate of four per cent (4%) per annum, interst payable annually on the First Day of January of each year, and being secured by a first mortgage deed of trust of even date herewith on the lands thereinafter described, I, J. S. Woods, do by these presents grant, bargain and seil, convey and warrant unto the said Carl A. McCown the following described lands, lying and being situated in the Second Court District of Panola County, in the State of Mississippi, to-wit:

The Northeast Quarter of Section Twenty-Five (25), Township Eight (8), Range Seven (7) West; and

Also, fifty-one (51) acres of land off of the Northwest Quarter of said Section Twenty-Five (25), having the following metes and bounds: Beginning eleven (11) chains North of the Southeast Corner of the said Northwest Quarter; thence North 72 degrees 55 minutes West, thirteen (13) chains and sixty (60) links; thence North 26 degrees 30 minutes West, nine (9) chains; thence North 8 degrees 30 minutes West, fourteen (14) chains; thence West eleven (11) chains and thirty-five (35) links; thence North three (3) chains and fifty (50) links to section line between Sections Twenty-Four (24) and Twenty-Five (25); thence East thirty (30) chains and fifty (50) links to Northeast Corner of said Northwest Quarter; thence South twenty-nine (29) chains to beginning.

Also, thirty (30) acres, more or less, in the Southeast Quarter of Section Twenty-Four (24), Township Eight (8), Range Seven (7) West, being all of said quarter section South of Hotophia Creek; and

Also, all of the West Half of said Section Twenty-Four (24) South of Tallahatchie River and West of Hotophia

Creek, except thirty-nine (39) acres off of the West side thereof, which said thirty-nine (39) acres is described as: Beginning at the South-West corner of said Section Twenty-Four (24); thence East nine (9) chains and fifty (50) links; thence North to said Tallhatchie River; thence with the meanderings of said River to the Section line between Sections Twenty-three (23) and Twenty-Four (24); thence South with the said Section line to beginning—the part of said West Half of said Section herein conveyed containing one hundred and seventy-one (171) acres, more or less.

Also; the Southwest Quarter of Section Twenty-Five (25), Township Eight (8), Range Seven (7) West; and

Also, one hundred and nine (109) acres of land, more or less, in the Northwest Quarter of said Section Twenty-Five (25), having the following metes and bounds: Beginning at the Southeast Corner of said Quarter Section; thence North eleven (11) chains; thence North 72 degrees 55 minutes West thirteen (13) chains and sixty (60) links; thence North 26 degrees 30 minutes West nine (9) chains; thence North 8 degrees 30 minutes West fourteen (14) chains; thence West eleven (11) chains and thirty-five (35) links; thence North three (3) chains and fifty (50) links, to Section line between Section Twenty-Four (24) and said Section Twenty-Five (25); thence West with said Section line Nine (9) chains and fifty (50) links to the Northwest Corner of Section Twenty-Five (25); thence South with Section line between Sections Twenty-Five (25) and Twenty-Six (26) to the Southwest Corner of said Northwest Quarter; thence East to the point of beginning.

Also, thirty-nine (39) acres of land, more or less, off of the West side of Section Twenty-Four (24), Township

Eight (8), Range Seven (7) West, South of Tallahatchie River, having the following metes and bounds: Beginning at the Southwest Corner of said Section Twenty-Four (24); thence East nine (9) chains and fifty (50) links; thence North to said Tallahatchie River; thence with the meanderings of said River to Section line between Section Twenty-Three (23) and said Section Twenty-Four (24); thence South with said Section line to the beginning.

Also, all of that part of Section Twenty-Three (23), Township Eight (8), Range Seven (7), West, South of Tallahatchie River, containing sixty (60) acres, more or less.

Also, one hundred and twenty (120) acres of land, more or less, in the East Half of Section Twenty-Six (26), Township Eight (8) Range Seven (7) West, having the following metes and bounds: Beginning ten (10) chains East from the center post on the North boundary line of said Section Twenty-six (26); thence South nineteen (19) degrees thirty-three (33) minutes East to the Southeast Corner of said Section; thence due North with East boundary to Northeast Corner of said Section; Thence due West on said North boundary line to beginning.

The above described lands constitute what is known as the "Potts Place," containing approximately 900 acres of land, owned by the undersigned grantor and situated about one mile southwest of Belmont Bridge, in the Second Court District of said Panola County.

The above described lands do not constitute any part of the homestead of the undersigned grantor and have never been occupied by the undersigned grantor as a homestead.

A vendor's lien is hereby expressly reserved and retained by the undersigned grantor upon the lands herein conveyed to secure the payment of the unpaid balance of said purchase price, evidenced by the above mentioned installment purchase money notes; and said indebtedness is further secured by a first mortgage deed of trust on said lands executed by the grantee herein of even date herewith.

The grantee herein has expressly assumed and agreed to pay all taxes and assessments, levied and assessed against the above described lands for the year 1946; and all taxes and assessments levied and assessed against said lands for the year 1946 and all succeeding years are excepted from the warranty contained in this deed.

Witness my signature, this the 1st day of January, 1946.

(Signed) J. S. WOODS.

State of Mississippi,
Panola County.

Before Me, Anna Maye Gillespie, a Notary Public in and for Panola County, in the State of Mississippi, duly commissioned, qualified and acting, this day personally appeared the above named J. S. Woods, grantor in the foregoing deed of conveyance, who acknowledged that he signed and delivered the foregoing deed of conveyance on the day and year therein mentioned as his voluntary act and deed and for the purposes and consideration therein stated.

Given under my hand and seal of office at Sardis, Mississippi, this the 21st day of January, 1946.

(Signed) ANNA MAYE GILLESPIE,
(Seal) Notary Public.

My Commission expires Feb. 2, 1948.

Filed for record on Jan. 22, 1946.

Recorded at Pages 174, 175 & 176 of Book E-1, Records land deeds of 2nd Court District Panola County, Miss.

EXHIBIT No. 5 TO SECOND AMENDED COMPLAINT.

31 Mortgage Deed of Trust.

Carl A. McCown Et Ux
to
J. S. Woods.

John W. Kyle, Trustee.

This Indenture, Made and entered into this the 1st day of January, 1946, between Carl A. McCown and his wife, Louise McCown of Panola County, in the State of Mississippi, as parties of the first part, and John W. Kyle, as Trustee and party of the second part, and J. S. Woods, of Panola County, in the State of Mississippi, as party of the third part, Witnesseth:

That, whereas, the said Carl A. McCown, party of the first part, is indebted to the said J. S. Woods, party of the third part, in the principal sum of Fifty-Four Thousand Dollars ($54,000.00), for the unpaid balance of the purchase price to be paid by the said Carl A. McCown to the said J. S. Woods for the lands hereinafter described which said indebtedness is evidenced by fourteen promissory notes of even date herewith, signed by the said Carl A. McCown, as maker, and payable to the said J. S. Woods, or his order, in the several amounts and becoming due and payable as follows:

One note for the principal sum of $2,500.00, due January 1, 1947;

One note for the principal sum of $2,500.00, due January 1, 1948;

One note for the principal sum of $4,000.00, due January 1, 1949;

One note for the principal sum of $4,000.00, due January 1, 1950;

One note for the principal sum of $4,000.00, due January 1, 1951;

One note for the principal sum of $4,000.00, due January 1, 1952;

One note for the principal sum of $4,000.00, due January 1, 1953;

One note for the principal sum of $4,000.00, due January 1, 1954;

One note for the principal sum of $4,000.00, due January 1, 1955;

One note for the principal sum of $4,000.00, due January 1, 1956;

One note for the principal sum of $4,000.00, due January 1, 1957;

One note for the principal sum of $4,000.00, due January 1, 1958;

One note for the principal sum of $4,000.00, due January 1, 1959 and

One note for the principal sum of $5,000.00, due January 1, 1960—

each of said notes bearing interest from January 1, 1946, until paid, at the rate of four per cent (4%) per annum, interest payable annually on the First day of January of each year, and each of said notes providing for the payment of a ten per cent attorney's fee, if placed in the hands of an attorney for collection, and providing for accelleration of payment of principal if default be made in the payment of any one of said notes, or any part thereof, or any interest thereon, when due; and

Whereas, the said parties of the first part have agreed to secure the prompt payment of said indebtedness, when due:

Therefore, in consideration of the premises and the sum of Ten Dollars, to the parties of the first part paid by John W. Kyle, party of the second part, who is hereby constituted and appointed Trustee herein, the receipt of which is hereby acknowledged, the said parties of the first part have this day granted, bargained and sold, and by these presents do give, grant, bargain, sell and convey to the said party of the second part, as Trustee aforesaid, and his successors, the following described lands, lying and being situated in the Second Court District of Panola County, in the State of Mississippi, to-wit:

The Northeast Quarter of Section Twenty-Five (25) Township Eight (8), Range Seven (7) West; and

Also, fifty-one (51) acres of land off of the Northwest Quarter of said Section Twenty-Five (25), having the following metes and bounds: Beginning eleven (11) chains North of the Southeast Corner of the said Northwest

Quarter; thence North 72 degrees 55 minutes West, thirteen (13) chains and sixty (60) links; thence North 26 degrees 30 minutes West, nine (9) chains; thence North 8 degrees 30 minutes West, fourteen (14) chains; thence West eleven (11) chains and thirty-five (35) links; thence North three (3) chains and fifty (50) links to Section line between Sections Twenty-four (24) and Twenty-Five (25); thence East thirty (30) chains and fifty (50) links to Northeast Corner of said Northwest Quarter; thence South twenty-nine (29) chains to beginning.

Also, thirty (30) acres of land, more or less, in the Southeast Quarter of Section Twenty-Four (24), Township Eight (8), Range Seven (7), West, being all of said quarter section South of Hotophia Creek; and

Also, all of the West Half of said Section Twenty-Four (24) South of Tallahatchie River and West of Hotophia Creek, except thirty-nine (39) acres on the West side thereof, which said thirty-nine (39) acres is described as: Beginning at the Southwest Corner of said Section Twenty-four (24); thence East nine (9) chains and fifty (50) links; thence North to said Tallahatchie River; thence with the meandering of said River to the Section line between Sections Twenty-Three (23) and Twenty-Four (24); thence South, with the said Section line, to beginning—the part of said West Half of said Section herein conveyed containing one hundred and seventy-one (171) acres, more or less.

Also, the Southwest Quarter of Section Twenty-Five (25), Township Eight (8), Range Seven (7), West; and

Also, one hundred and nine (109) acres of land, more or less, in the Northwest Quarter of said Section Twenty-Five (25), having the following metes and bounds: Be-

ginning at the Southeast Corner of said Quarter section; thence North eleven (11) chains; thence North 72 degrees 55 minutes West thirteen (13) chains and sixty (60) links; thence North 26 degrees 30 minutes West nine (9) chains; thence North 8 degrees 30 minutes West fourteen (14) chains; thence West eleven (11) chains and thirty-five (35) links; thence North three (3) chains and fifty (50) links, to Section line between Section Twenty-four (24) and said Section Twenty-Five (25); thence West with said Section line nine (9) chains and fifty (50) links to the Northwest Corner of Section Twenty-five (25); thence South, with Section line between Sections Twenty-five (25) and Twenty-Six (26), to the Southwest Corner of said Northwest Quarter; thence East to the point of beginning.

Also, thirty-nine (39) acres of land, more or less, off of the West side of Section Twenty-Four (24) Township Eight (8), Range Seven (7) West, South of Tallahatchie River, having the following metes and bounds: Beginning at the Southwest Corner of said Section Twenty-Four (24); thence East nine (9) chains and fifty (50) links; thence North to said Tallahatchie River; thence with the meanderings of said River to Section line between Section Twenty-Three (23) and said Section Twenty-Four (24); thence South with said Section line to beginning.

Also, all of that part of Section Twenty-Three (23), Township Eight (8), Range Seven (7) West, South of Tallahatchie River, containing sixty (60) acres, more or less.

Also, one hundred and twenty (120) acres of land, more or less, in the East Half of Section Twenty-six, (26), Township Eight (8), Range Seven (7) West, having the

following metes and bounds: Beginning ten (10) Chains East from the center cost on the North boundary line of said Section Twenty-Six (26); thence South nineteen (19) degrees and thirty-three (33) minutes East, to the Southeast Corner of said Section; thence due North with East boundary to Northeast Corner of said Section; thence due West on said North boundary line to beginning—

The above described lands being the lands, known as the "Potts Place," situated about one mile southwest of Belmont bridge, in the Second Court District of Panola County, Mississippi, and being the lands this day conveyed to the above named Carl A. McCown by the said J. S. Woods by warranty deed dated January 1, 1946, and filed for record in the office of the Chancery Court Clerk of said Panola County, at Batesville, Mississippi.

And the said parties of the first part covenant and agree to warrant and forever defend the title to said above described lands, with the appurtenances thereto, to the said Trustee and his successors.

This conveyance is made In Trust, however, and is subject to the following limitations and conditions, to-wit:

Should the said Carl A. McCown, party of the first part, promptly pay the above mentioned indebtedness, evidenced by said series of notes, as aforesaid, when and as the same shall become due, as aforesaid, then this instrument to be void. But if default be made in the payment of said indebtedness, or any part thereof, or any interest thereon, when due, all of said notes and indebtedness shall become due and payable at once, at the option of the said party of the third part, or the legal

holder, or holders of said notes, whether the same be then due according to the dates of maturity stated in said notes or not, and the said party of the second part, as Trustee aforesaid, at the request of the said party of the third part, or his legal representatives or assigns, shall take possession of the above described property, being the lands hereinabove described and after giving notice of the time, place and terms of sale by a notice published for three consecutive weeks preceding such sale in a newspaper published in the Second Court District of Panola County, Mississippi, and by posting a copy of said notice of sale at the front door of the County Courthouse, in the Second Court District of said Panola County, for three weeks preceding such sale, shall sell said property, being the lands hereinabove described, at public out-cry, to the highest bidder, or bidders, for cash, at the front door of the County Courthouse, in the Second Court District of said Panola County, within lawful hours, on the day designated therefor in said notice of sale, and shall execute a written conveyance of said lands to the purchaser, or purchasers, which shall vest in such purchaser, or purchasers, a full and perfect title to said lands, with the right of immediate possession thereof.

The said Trustee may sell said lands, as provided herein, on any day that he may designate therefor in said notice of sale, it being the intention of the parties hereto to vest in said Trustee full discretion in fixing the time for making said sale.

The proceeds derived from the sale of said lands, as aforesaid, shall be applied by the Trustee, first, to the payment of all costs and expenses incurred by the Trustee in advertising and selling said property, including a commission of three per cent (3%) of the amount of the proceeds of such sale to be retained by the Trustee as

compensation for his services in executing said trust, and secondly, to the payment of the indebtedness hereinabove described which at that time remain unpaid, whether said notes be then due according to the dates of maturity stated in said notes or not, and all interest accrued thereon to the date of such sale. For it is expressly stipulated and agreed that, if default be made in the payment of any of the above described notes, when due, the said party of the third part, his legal representatives or assigns shall have the right to an immediate foreclosure of this deed of trust, and the Trustee shall be authorized forthwith, at the request of the said party of the third part, his legal representatives, or assigns, to take possession of said property, being the lands hereinabove described, and advertise and sell the same for the payment of said indebtedness and all costs and expenses, as provided in this deed of trust; and, in such event, all of said notes which at that time remain unpaid shall become due and payable at once, whether the same be then due according to the dates of their maturity or not, and shall be collectible out of the proceeds of such sale.

If there be a surplus, after the payment of said costs and expenses and all of the notes and interest secured by this deed of trust, such surplus shall be paid over to the said Carl A. McCown, party of the first part.

The said parties of the first part covenant and agree to pay all taxes that may be levied and assessed against the above described lands during the life of this deed of trust, when and as the same shall become due. And, in the event the said parties of the first part shall fail to pay said taxes, or any part thereof, when and as the same shall become due the said party of the third part may pay the same, and any and all amounts so paid by the said party of the third part shall be repaid to the said

party of the third part by the said parties of the first part on demand, and until so repaid shall become a part of the indebtedness secured by this deed of trust and shall bear interest at the rate of four per cent (4%) per annum.

If the above described property shall at any time become endangered as a security for said indebtedness, the Trustee may take the same into his possession and hold or control the same until said indebtedness and all costs are liquidated by payment thereof or sale of said property; but, until demanded by the Trustee, the said parties of the first part shall hold the same subject to this deed of trust.

In case of failure, refusal, death or inability on the part of said Trustee to execute the trust herein confided, the said party of the third part, his legal representatives, or assigns, can, at any time, appoint a Trustee to act in his place and stead, or in the place and stead of any succeeding Trustee, which appointment shall be made in writing and shall be put of record in the office of the Chancery Court Clerk of the Second Court District of said Panola County before the first advertisement of sale shall have been published, and shall vest in such succeeding Trustee all of the title and powers herein conferred upon his predecessor.

The indebtedness secured by this deed of trust is further secured by a vendor's lien on the above described lands reserved and retained in the deed of conveyance of said lands this day executed by the said J. S. Woods to the said Carl A. McCown.

All right, powers and privileges herein conferred upon or vested in the said party of the third part are likewise

conferred upon and vested in his legal representatives and assigns.

In Testimony Whereof, the said parties of the first part have hereunto set their hands, the day and year first above written.

(Signed) C. A. McCOWN.

State of Mississippi,
Panola County.

Before Me, M. E. Jarrett, a Notary Public, in and for Panola County, in the State of Mississippi, duly commissioned, qualified and acting, this day personally appeared the above named Carl A. McCown and his wife, Louise McCown, grantors in the foregoing deed of trust, who severally acknowledged that they, and each of them, signed and delivered the foregoing deed of trust on the day and year therein mentioned as their voluntary act and deed and for the purposes and consideration therein stated.

Given under my hand and seal of office at Batesville, Mississippi, this the 22nd day of January, 1946.

(Signed) M. E. JARRETT,
(Seal) Notary Public.

My commission expires December 31, 1947.

EXHIBIT No. 6 TO SECOND AMENDED COMPLAINT.

39 Mortgage Deed of Trust.

Carl A. McCown
to
J. S. Woods

John W. Kyle, Trustee.

State of Mississippi,
Panola County.

This Indenture, made and entered into this the 1st day of January, 1946, between Carl A. McCown, of the County of Panola and State of Mississippi, of the first part, and J. S. Woods, of the County of Panola, in the State of Miss. of the second part, Witnesseth:

That, whereas, the said Carl A. McCown, party of the first part, is justly indebted to the said J. S. Woods, party of the second part, in the principal sum of $54,000.00, for the unpaid balance of the purchase price of approximaely 900 acres of land, lying and being situated about one mile southwest of Belmont bridge, in the Second Court District of Panola County, Mississippi, known as the "Potts Place," this day conveyed by the said J. S. Woods to the said Carl A. McCown, which said indebtedness is evidenced by fourteen promissory notes, of even date herewith, signed by the said Carl A. McCown, as maker, and payable to the said J. S. Woods, or his order, in amounts and becoming due and payable as follows: One note for the principal sum of $2,500.00, becoming due and payable on the First Day of January of each of the years 1947 and 1948, and one note for the principal sum of $4,000.00 becoming due and payable on the First Day of January of each of the years 1949 to 1959,

both inclusive, and one note for the principal sum of $5,000.00 becoming due and payable on the First Day of January, 1960—each of said notes bearing interest from the date thereof until paid at the rate of four per cent (4%) per annum, interest payable annually, and providing for the payment of a ten per cent attorney's fee, if placed in the hands of an attorney for collection, and providing for acceleration of payment of the principal thereof if default be made in the payment of any of the notes of said series of notes, or any interest thereon, when due, and all of said notes being secured by a vendor's lien and a first mortgage deed of trust upon said lands, known as the "Potts Place"; and

Whereas, the said party of the first part has agreed to further secure the prompt payment of the first three notes of the above mentioned series of notes, when due, by a mortgage deed of trust on the lands and other property hereinafter described—the notes hereby secured being the above mentioned $2,500.00 note becoming due January 1, 1947, and the above mentioned $2,500.00 note becoming due January 1, 1948, and the above mentioned $4,000.00 note becoming due January 1, 1949, as aforesaid:

Therefore, in consideration of the premises and the sum of One Dollar to the said party of the first part paid by John W. Kyle, who is hereby constituted and appointed Trustee herein, the receipt of which is hereby acknowledged, the said party of the first part has this day granted, bargained and sold, and by these presents does give, grant, bargain, sell and convey to the said Trustee and his successors the following described property, located, lying and being situated in the Second Court District of Panola County, in the State of Mississippi, to-wit:

Those certain lots, tracts or parcels of land situated in the Second Court District of the County of Panola and

State of Mississippi, and being situated in Sections 5 and 6, Township 9 South, Range 7 West, and Section 32, Township 8 South, Range 7 West, more particularly described as follows:

Beginning at a point on the center line of the Old Panola Road that is 760 feet West of the Northeast Corner of Section 6, Township 9, Range 7 West, run South 7 degrees East along said road 243 feet to a point; thence North 32 degrees 29 minutes East 78.6 feet to a point in the East right-of-way line of said road, which point is the point of beginning of the description of the land herein conveyed; thence continuing North 32 degrees 25 minutes East 30.6 feet to a point; thence North 20 degrees 18 minutes East 146.5 feet to a point; thence North 13 degrees .06 minutes East 220 feet to a point; thence North 1 degree 37 minutes West 80.4 feet to a point; thence North 14 degrees 16 minutes West 296 feet to a point; thence North 8 degrees 54 minutes West 41.4 feet to a point; thence North 6 degrees 54 minutes East 228.4 feet to a point; thence North 47 degrees 23 minutes East 357.8 feet to a point by a twin holly; thence North 74 degrees 12 minutes West 3964.7 feet to a point on the West bank of the Tallahatchie River; thence in a Southwesterly direction along the said West Bank the following bearings and distances: South 42 degrees .09 minutes West 200.2 feet; South 19 degrees 12 minutes West 312.5 feet; South 11 degrees .07 minuts East 200 feet; South 30 degrees 21 minutes East 551.2 feet; South 7 degrees 31 minutes East 189.6 feet; South 29 degrees 17 minutes West 218.4 feet; South 84 degrees 15 minutes West 13.1 feet; North 84 degrees and 15 minutes West 222 feet; North 60 degrees 29 minutes West 238.4 feet; North 85 degrees 16 minutes West 576.1 feet; South 60 degrees 24 minutes West 282.8 feet; South 29 degrees 13 minutes West 289.5 feet; South 15 degrees and 11 minutes West 334.1 feet;

South 14 degrees 19 minutes East 237.7 feet; South 50 degrees 50 minutes East 443 feet; South 4 degrees 42 minutes East 140.0 feet; South 48 degrees 57 minutes West 190.7 feet; South 86 degrees 01 minutes West 533.6 feet; South 65 degrees 58 minutes West 242.2 feet; South 44 degrees 34 minutes West 337.6 feet; South 24 degrees 43 minutes west 235.6 feet; South 4 degrees 18 minutes West 201.7 feet; South 27 degrees and 21 minutes West 425.7 feet; South 8 degrees 28 minutes West 461.2 feet 47 degrees 21 minutes West 730.7 feet to a point on the East right-of-way line of the Old Panola Road; thence along said right-of-way line the following bearings and distances: North 43 degress 21 minutes West 125.4 feet; North 2 degrees 57 minutes West 755.75 feet; North 29 degrees 27 minutes West 374.8 feet; North 3 degrees 24 minutes West 579.5 feet; North 6 degrees 41 minutes East 411.2 feet; North 7 degrees West 423.7 feet to point of beginning, and containing 200 acres, more or less.

Also, the following described lot, tract or parcel of land, situated in the Second Court District of Panola County, Mississippi, and in the East Half of Section 6, Township 9, Range 7 West, to-wit:

Begin at a point on the center line of Old Panola Road that is 760 feet West of the Northeast Corner of Section 6, Township 9, Range 7 West, run South 7 degrees East along the center line of said Old Panola Road 243 feet to a point, which said point is the beginning of the description of the land conveyed herein; thence North 32 degrees 29 minutes East 78.6 feet to a point in the East right-of-way line of said road: thence in a Southerly direction along and with the Easterly right-of-way line and a distance of 50 feet from the center of said Old Panola Road in a Southerly direction to the point of its intersection with the Tallahatchie River, thence in a South-

westerly direction along and with Tallahatchie River to its point of intersection with the center line of said Old Panola Road; thence in an Northerly direction along and with the center line of said Old Panola Road to the point of beginning, and being the land conveyed to James E. Wilson by L. Wilder and wife by deed of record in Book B-1, at page 357.

The above described lands are the lands conveyed to the said Carl A. McCown by James E. Wilson and wife, Willie Belle Wilson by warranty deed dated the 28th day of August, 1944, and recorded in Book C-1, at page 279, of the records of Land Deeds in the office of the Chancery Court Clerk of said Panola County, at Batesville, Mississippi. Said lands are subject to an easement for the power line of Tallahatchie Valley Electric Power Association.

Also, the following described, personal property, now owned by the said party of the first part and used during the year 1945 in the farming operations on the above described land, all of which is to be transferred immediately to the said "Potts Place" for use in the farming operations on said "Potts Place" during the year 1946 viz.;

1 Model A. John Deere tractor, Serial No. 507698.
1 Athens Bush and Bog Disc.
1 red horse mule, 6 years old, named "Jake".
1 red mare mule, 6 years old, named "Kate".
1 iron gray mule, 7 years old, named "Rock".
1 mare, 8 years old, acquired from Lud Hentz.
4 white face cows.

And the party of the first part covenants and agrees to warrant and forever defend the title to the above de-

scribed property, with its appurtenances, to the said Trustee and his successors.

This conveyance is made in Trust, however, and is subject to the following limitations and conditions, to-wit:

Should the said party of the first part promptly pay the first three installments of the above mentioned indebtedness, evidenced by said two notes for $2,500.00 each, due January 1, 1947, and January 1, 1948, respectively, and said note for $4,000.00 due January 1, 1949, with interest as provided therein, when and as the same shall become due, then this instrument to be void. But if default be made in the payment of any of said first three installments of said indebtedness, as aforesaid, or any part thereof, or any interest thereon, when due, as aforesaid, the said Trustee, at the request of the said party of the second part, or his legal representatives or assigns, shall take possession of said property, being the lands and personal property, herinabove described, and after giving notice of the time, place and terms of sale by a notice published for three consecutive weeks preceding such sale in a newspaper published in the Second Court District of Panola County, Mississippi, and by posting a copy of said notice of sale at the front door of the County Courthouse in said District and County, for three weeks preceding such sale, shall sell said property, being the lands and personal property hereinabove described, at public out-cry to the highest bidder, or bidders, for cash, at the front door of the County Courthouse, in the Second Court District of said Panola County, within lawful hours, on the date designated therefor by the said Trustee in said notice of said sale, and shall execute a written conveyance of said property to the purchaser, or purchasers, which conveyance shall vest in

such purchaser, or purchasers, a full and perfect title to said property, with the right of immediate possession thereof.

The proceeds derived from the sale of said property, as aforesaid, shall be applied by the Trustee to the payment of the above mentioned indebtedness evidenced by said two notes for $2,500.00 each, due January 1, 1947, and January 1, 1948, respectively, and said note for $4,000.00 due January 1, 1949, as aforesaid, and all costs incurred herein. And, it is expressly stipulated and agreed that, if default be made in the payment of any of of the above mentioned three notes, which are secured by this deed of trust, when due, the party of the second part, his legal representatives or assigns, shall have the right to an immediate foreclosure of this deed of trust, and the Trustee shall be authorized forthwith, at the request of the said party of the second part, his legal representatives or assigns, to take possession of said property, being the lands and personal property hereinabove described, and advertise and sell the same for the payment of said indebtedness and all costs and expenses, as provided in this deed of trust; and, in such event, all of that part of said three notes which at that time remains unpaid shall become due and payable at once, and shall be collectible out of the proceeds of such sale. If there be a surplus, after the payment of said three notes, with interest, and the costs and expenses incurred by the Trustee in advertising and selling said property, such surplus shall be paid over to the said party of the first part.

The said party of the first part covenants and agrees to pay all taxes that may be levied and assessed against the above described property during the life of this deed of trust, when and as the same shall become due. And, in the event the said party of the first part shall fail to

pay said taxes, when and as same shall become due, the said party of the second part may pay the same, and any and all amounts so paid by the said party of the second part shall be repaid to the said party of the second part by the said party of the first part on demand, and until so repaid shalll become a part of the indebtedness secured by this deed of trust and shall bear interst at the rate of four per cent (4%) per annum.

If the above described property shall at any time become endangered as a security for said indebtedness, the Trustee may take the same into his possession and hold or control the same until said indebtedness and all costs are liquidated by payment thereof or sale of said property; but, until demanded by the Trustee, the said party of the first part shall hold the same subject to this deed of trust.

In case of failure, refusal, death or inability on the part of said Trustee to execute the trust herein confided, the said party of the second part, his legal representatives or assigns, can, at any time, appoint a Trustee to act in his place and stead, or in the place and stead of any succeeding Trustee, which appointment shall be made in writing and shall be put of record in the office of the Chancery Court Clerk of the Second Court District of said Panola County before the first advertisement of sale shall have been published and shall vest in such succeeding Trustee all the title and powers herein conferred upon his predecessor.

All rights, powers and privileges herein conferred upon or vested in the said party of the second part are likewise conferred upon and vested in his legal representatives and assigns.

This deed of trust is a second mortgage deed of trust on the lands hereinabove described and conveyed and is subordinate to a first mortgage deed of trust given by the party of the first part to D. R. Johnson, as Trustee, on the 28th day of August, 1944, to secure the payment of the balance of the purchase price of said lands owing by the said party of the first part to James E. Wilson which said deed of trust duly recorded in Book 162 at page 101 of the records of Land Deeds of Trust in the office of the Chancery Court Clerk of said Panola County, at Batesville, Mississippi. The balance of said purchase price which mortgage indebtedness against said lands when and as the same shall become due, so as to preserve said property as security for the indebtedness secured by this deed of trust, and so as to preserve the line herein created as additional security for the payment of the indebtedness secured by this deed of trust.

The indebtedness secured by this deed of trust, which, as stated above, constitutes a part of the unpaid balance of the purchase price which the said party of the first part has agreed to pay to the said party of the second part for the lands described as the "Potts Place," situated about one mile southwest of Belmont Bridge, in the Second Court District of said Panola County, is secured by a vendor's lien and a first mortgage deed of trust on said lands known as the "Potts Place," as security for the payment of all of the unpaid balance of the purchase price which the said party of the first part has agreed to pay to the said party of the second part for said lands as the "Potts Place," which said balance is evidenced by the above mentioned fourteen notes, aggregating the total principal sum of $54,000.00. This deed of trust is given as additional and cumulative security, to further secure the prompt payment of the first three notes of said series, as aforesaid, when due, as aforesaid.

The party of the first part hereby certifies that the lands hereinabove described constitute no part of the homestead of the said party of the first part and have never been occupied by the said party of the first part as a homestead.

In Witness Whereof, the said party of the first part has hereunto set his hand, the day and year first above written.

(Signed) CARL A. McCOWN.

State of Mississippi,
Panola County.

Before me, Anna Maye Gillespie, Notary Public in and for Panola County, in the State of Mississippi, duly commissioned, qualified and acting, this day personally appeared the above named Carl A. McCown, grantor in the foregoing instrument, who acknowledged that he signed and delivered the foregoing instrument on the day and year therein mentioned as his voluntary act and deed and for the purposes and consideration therein stated.

Given under my hand and seal of office, at Sardis, Mississippi, this the 21st day of January, 1946.

(Signed) ANNA MAYE GILLESPIE,
(Seal) Notary Public, Panola County, Miss.

My commission expires February 2nd, 1948.

Second Amended Complaint. Filed this 27 day of October, 1947.

ANSWER OF DEFENDANT TO SECOND AMENDED COMPLAINT.

48 (Title Omitted.)

Now comes J. S. Woods, the defendant in the above numbered and styled cause in this Court, and, for answer to the Second Amended Complaint filed against him herein, says that:

Count #1.

1, 2, 3, 4 & 5.

He admits the allegations of paragraphs 1, 2, 3, 4 and 5. Further answering paragraph 1, he says that the Complainant is, and was at all times mentioned in the complaint, engaged in the real estate brokerage business in the State of Mississippi; that the Complainant has never become domesticated in the State of Mississippi as authorized by Section 5339 of the Mississippi Code of 1942; that it has never qualified to do business in the State of Mississippi as required by Section 5343 of said code; that it has never designated a resident agent in the State of Mississippi as required by the second paragraph of Section 5319 of said code; that it has never paid any privilege license tax to engage in said business in the State of Mississippi as required by Section 155 of Chapter 137 of the Mississippi Laws of 1944; and that, therefore, the Complainant was not capable of making an enforceable contract in the State of Mississippi and is not entitled to maintain any suit in any Court in said state.

6, 7 & 8.

He denies the allegations of paragraphs 6, 7 and 8. He says that the truth with reference to the matters al-

leged in said paragraphs is as follows: In the year 1944 the defendant made a verbal agreement with the said Partee that if, within a period of ninety days from the date of the agreement, Partee would produce a purchaser for the land at a price in excess of $70,000.00, he would pay Partee the amount in excess of $70,000.00 as his commission. This 90-day period expired without Partee producing a purchaser. On March 12, 1945, the defendant entered into a written agreement with United Service & Research, Inc., (which company was then being represented by D. S. Cline and not by L. A. Conolly) that if, within a period of ninety days from said date, said company would produce a purchaser for the land at a price of at least $70,000.00, he would pay said company a commission of 5% of the purchase price. This 90-day period expired on June 12, 1945, without said company producing a purchaser. On or about June 13, 1945, Partee telephoned the defendant from Memphis and told the defendant that he (Partee) had located a purchaser for the property and that he (Partee) would call on the defendant at Sardis, Mississippi, on the following day and discuss the matter. On the following day Partee called on the defendant, and on that date the defendant made a verbal agreement with Partee that if, within 75 or 90 days (the defendant not now recalling the exact number of days agreed upon) Partee would produce a purchaser for the land at a price of at least $68,500.00, he would pay Partee a commission of 5% of the purchase price. The agreed period expired without Partee producing a purchaser. At Partee's request he was then given an extension of ten additional days within which to produce a purchaser on said terms, but this extension also expired without Partee producing a purchaser. The expiration of said extension, on or about September 15, 1945, left the defendant under agreement to no one with reference to the sale of said land. Up to

this point he had never authorized any one to offer his personal property for sale. Further answering paragraphs 6, 7 and 8, he says that the allegations of said paragraphs are not pertinent or relevant to the cause of action attempted to be stated in the complaint, and he moves the Court to strike said paragraphs from the complaint.

9.

Having no knowledge nor means of knowledge as to the allegations of paragraph 9, he denies said allegations. He says further that said allegations are not pertinent or relevant to the cause of action attempted to be stated in the complaint, and he moves the Court to strike said paragraph from the complaint.

10.

He admits the allegations of paragraph 10, except that he denies that said contract was entered into in Memphis, Tennessee. He states the truth to be that said contract was prepared by the complainant and was submitted to him for acceptance and execution in the Town of Sardis, Mississippi. He says further that he accepted and executed the same in the Town of Sardis, Mississippi.

11.

He admits the allegations of paragraph 11, except that he denies that the terms of sale proposed to him, as set out in said paragraph, were satisfactory to him. He says further that the property of the said McCown was already subject to a valid first lien to secure an indebtedness of $9,500.00 and that the said McCown had an equity

therein of only $3,500.00 which equity had no sound loan value.

12 & 13.

He admits the allegations of paragraph 12 and 13. He states further that, for the consideration stated in said deed (Exhibit 4), he also conveyed to McCown, by bill of sale showing only a nominal consideration, the personal property listed in Exhibit 3 and other personal property.

14 & 15.

He admits the allegations of paragraphs 14 and 15.

16.

He denies the allegations of paragraph 16.

17.

He admits the allegations of paragraph 17.

18.

He denies the allegations of paragraph 18.

And now, having fully answered Count #1 of the complaint, he prays that the same be dismissed.

Count #2.

1 through 15.

For answer to the first 15 paragraphs of Count #2 of the complaint, he adopts the answers hereinabove made

to the first 15 paragraphs of Count #1, said paragraphs being identical.

16.

He denies the allegations of paragraph 16.

17 and 18.

For answer to paragraphs 17 and 18 of Count #2 of the complaint, he adopts the answers hereinabove made to paragraphs 17 and 18 of Count #1, said paragraphs being identical.

And now, having fully answered Count #2 of the complaint, he prays that the same be dismissed.

(Signed) JOHN W. KYLE,
(John W. Kyle)

Sardis, Mississippi.

McCLURE & FANT,
(Signed) By HERBERT M. FANT,
Attorneys for Defendant.

Sardis, Mississippi.

51 CERTIFICATE.

I, the undersigned Herbert M. Fant, a member of the law firm of McClure & Fant, of counsel for the defendant, hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing answer of the defendant unto Honorable Phil Stone, Attorney for the Complainant, properly addresed to him at his correct post office address in the City of Oxford, Mississippi.

This the 22nd day of November, 1947.

(Signed) HERBERT M. FANT,
Of Counsel for Defendant.

Sardis, Mississippi.

Filed this 24 day of Nov., 1947.

53 REQUEST FOR ADMISSION.

(Title Omitted.)

Now comes the defendant, J. S. Woods, and hereby requests the complainant, Interstate Realty Company, to admit for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, the truth of each of the following statements:

1. The Complainant is, and was at all times mentioned in the complaint, engaged in the real estate brokerage business in the State of Mississippi.

2. The Complainant has never become domesticated in the State of Mississippi as authorized by Section 5339 of the Mississippi Code of 1942.

3. The Complainant has never qualified to do business in the State of Mississippi as required by Section 5343 of said Code.

4. The Complainant has never designated a resident agent in the State of Mississippi as required by the second paragraph of Section 5319 of said code.

5. The Complainant has never paid any privilege license tax to engage in the real estate brokerage business in the State of Mississippi as required by Section 155 of Chapter 137 of the Mississippi Laws of 1944.

6. In each of one or more years immediately preceding the 20th day of November, 1945, the Complainant (a) accepted a substantial number of employments to locate purchasers for tracts of real estate located in the

State of Mississippi, (b) consummated a substantial number of sales of real estate located in the State of Mississippi, (c) advertised, in newspapers and otherwise, that its agents would meet prospective purchasers in the State of Mississippi and show them lands listed with it for sale, (d) sent its agents on frequent trips into the State of Mississippi in and about its real estate brokerage business, (e) solicited and accepted in the State of Mississippi a substantial number of employments to sell real estate, (f) collected a substantial amount of money as compensation for services rendered by it as a real estate broker in the State of Mississippi, and (g) performed in the State of Mississippi, on a substantial number of occasions, all of the acts necessary to the operation of a real estate brokerage business.

Unless, within ten days from this date, the Complainant shall file and serve a sworn denial of the foregoing statements, said statements shall be deemed admitted in accordance with Rule 36 of the Federal Rules of Civil Procedure.

This the 24th day of November, 1947.

(Signed) JOHN W. KYLE.
(John W. Kyle)

Sardis, Mississippi.

McCLURE & FANT.
(Signed) By JAMES McCLURE.
(James McClure)
Attorneys for J. S. Woods,
Defendant.

Sardis, Mississippi.

I hereby certify that I have this day mailed, postage fully prepaid, a true and correct copy of the foregoing "Request for Admission" to each of the attorneys for the

above named Complainant at their correct postoffice addresses, namely and to-wit: Hon. Phil Stone, Oxford, Mississippi, and Hon. L. C. Andrews, Oxford, Mississippi.

Witness my signature on this the 24th day of November, 1947.

(Signed) JAMES McCLURE
Of Counsel for Defendant.

Filed this 25 day of Nov., 1947.

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55 COMPLAINANT'S ADMISSION OF FACTS.

(Title Omitted.)

In response to the Request for Admissions heretofore filed herein by the defendant, and in order that the Court may be advised of certain other facts admitted by it, the complainant, Interstate Realty Company, hereby admits that the following statements are true and correct.

1. The complainant is now, was at all times mentioned in the complaint, and has been for several years engaged in the real estate business in the State of Tennessee, having an office at 107 Madison Avenue, Memphis, Tennessee. Complainant has made sales of real estate in the State of Mississippi as will be more definitely set out later herein.

2. Complainant has never become domesticated in the State of Mississippi as authorized by Section 5339 of the Mississippi Code of 1942 for the reason that complainant was, and still is, of the opinion that it was not, and is not, doing business in the State of Mississippi within the purview of the Mississippi statutes relating thereto.

3. Complainant has never qualified to do business in the State of Mississippi as required by Section 5343 of said code for the reasons set out in paragraph 2 above.

4. Complainant has never designated a resident agent in the state of Mississippi as required by the second paragraph of Section 5319 of said code for the reasons set out in paragraph 2 above.

5. Complainant has never paid any privilege license tax to engage in the real estate brokerage business in the State of Mississippi as required by Section 155 of Chapter 137 of the Mississippi Laws of 1944 for the reason set out in paragraph No. 2 above.

6. (a) In each year for the years 1942-1946, both inclusive, Complainant has accepted employment to locate purchasers for tracts of real estate located in the State of Mississippi.

(b) Complainant has consummated sales of real estate located in the State of Mississippi and those sales and commissions, together with total sales and commissions earned by Complainant in all of its business are hereby set out:

	Total Commissions in all States	Mississippi Commissions	Percentage of Mississippi Commissions to Total Commissions
1942	$ 22,756.45	$ 2,121.75	9.324
1943	$ 24,600.45	$ 4,064.25	16.521
1944	$ 58,003.90	$12,000.00	20.688
1945	$ 78,428.71	$14,272.27	18.198
1946	$ 96,684.26	$14,430.75	14.926
Total	$280,473.77	$46,889.02	16.718

	Total Sales Made	Number of Mississippi Sales	Percentage of Mississippi to Total Sales
1942	24	3	12.5
1943	28	2	7.143
1944	64	3	4.688
1945	218	14	6.422
1946	127	16	12.598
Total	461	38	8.243

(c) Complainant has never advertised in the newspapers in Mississippi that it would meet prospective purchasers at any location in Mississippi for the purpose of doing business with them and has never authorized anyone to so advertise for it. Such advertisements may have been made by Charles W. Partee at a time when he was not employed by Complainant. Complainant has advertised in Mississippi papers and in papers in other states regarding the sale of property in Mississippi and other states but this referred to sales of specific property and complainant has never maintained any office in Mississippi and has never advertised from any specific location in Mississippi. In any such advertisement by complainant the location of the office of complainant has always been given as Memphis.

(d) The agents of complainant made trips to Mississippi for the purpose of showing and selling to prospective purchasers lands listed with complainant for sale in all of those cases where sales were made as hereinabove set out, and also made trips into Mississippi for the purpose of selling and showing to prospective purchasers other lands listed with complainant for sale, where no sales were made, but complainant has never had any agent located in Mississippi and seldom have such agents stayed overnight in Mississippi.

(e). Complainant has accepted in Mississippi employments to sell real estate. Some of said employments resulted in sales being made as set forth hereinabove, but many of said employments did not result in any sale being made.

(f) The exact amount of money received by complainant from the sale of real estate located in Mississippi during the years 1942-46, both inclusive, has been set out in subdivision (b) of this paragraph.

(g) Complainant has performed in the State of Mississippi on several occasions some of the actions necessary to the operation of real estate business but it would be merely a conclusion for complainant to say that it has performed in the State of Mississippi all of the actions necessary to the operation of a real estate business. As a matter of fact, in almost all instances the final steps necessary to closing sales of real estate located in Mississippi have been taken in the Memphis office of complainant.

7. In connection with our business we sell property located in Tennessee, Arkansas, Mississippi, Southeastern Missouri, Northern Louisiana, Northwestern Alabama and Southwestern Kentucky.

8. The defendant's employment of the Complainant was solicited and accepted by the complainant in the State of Mississippi.

Respectfully submitted,
(Signed) L. C. ANDREWS,
(Signed) PHIL STONE,
Attorneys for Complainant.

Filed this 15 day of Dec., 1947.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

59 (Title Omitted)

Now comes the defendant, J. S. Woods, and would respectfully show unto the Court:

1. That the pleadings and admissions on file herein show that there is no genuine issue between the parties hereto as to the following facts:

(a) The complainant is a corporation organized and existing under the laws of the State of Tennessee.

(b) The complainant has never become domesticated in the State of Mississippi as authorized by Section 5339 of the Mississippi Code of 1942, has never qualified to do business in the State of Mississippi as required by Section 5343 of said code, has never designated as resident agent in the State of Mississippi as required by Section 5319 of said code, and has never paid any privilege license tax to engage in the real estate brokerage business in the State of Mississippi as required by Section 155 of Chapter 137 of the Mississippi Laws of 1944.

(c) The basis of the claim asserted in Count I of the Second Amended Complaint is an express contract of employment alleged to have been obtained by the complainant from the defendant in the course of the complainant's activities in the State of Mississippi, and the basis of the claim asserted in Count II thereof is an implied contract of employment alleged to have been obtained by the complainant from the defendant in the course of the complainant's activities in the State of Mississippi.

(d) The defendant made no express or implied contract with the complainant except such as may have been made by him with the complainant in the State of Mississipi.

(e) The complainant is, and was at all times mentioned in the complaint, engaged in the real estate brokerage business in the State of Mississippi.

2. That, by reason of said facts, the complainant is not entitled to maintain any suit in any Court in the State of Mississippi.

3. That, by reason of said facts, the contracts alleged to have been obtained by the complainant were unenforceable and no suit against the defendant may be predicated thereon.

4. That, as a matter of law, the defendant is entitled to a final order of dismissal herein.

Wherefore, the defendant, acting under Rule 56 of the Federal Rules of Civil Procedure, respectfully moves the Court to enter herein a summary judgment under the terms of which the Second Amended Complaint herein will be finally dismissed at the cost of the complainant.

Respectfully submitted,

(Signed) JOHN W. KYLE,
(John W. Kyle)

Sardis, Mississippi.

McCLURE & FANT,
(Signed) By JAMES McCLURE,
(James McClure)
Attorneys for J. S. Woods,
Defendant.

Sardis, Miss.

Service of the foregoing motion, upon the complainant, Interstate Realty Company, is hereby waived. This the 15 day of December, 1947.

(Signed) L. C. ANDREWS.
(Signed) PHIL STONE.
Attorneys for Complainant.

Filed this 15 day of Dec., 1947.

62 COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS.

(Title Omitted.)

Appearances:

Hon. L. C. Andrews, and Hon. Phil Stone, of Oxford, Mississippi, for the Complainant.

Messrs. McClure & Fant, and Hon. John W. Kyle, of Sardis, Mississippi, for the Defendant.

(This cause was called up by the Court and counsel for Complainant and Defendant announced ready to proceed, the pleadings were read to the Court, and the following oral proceedings were had:)

Mr. Stone:

The Complainant denies that the Motion for Summary Judgment herein should be granted because of the following reasons: First, the complainant was not doing business and is not doing business in the State of Mississipi within the purview of the applicable statutes. Second, even if the complainant was doing business in the State of Mississippi, and even if for this reason complainant could not bring and maintain this action in the Courts of the State of Mississippi, still complainant is

not barred from bringing and maintaining this action in the United States Courts, and a contrary construction of the applicable statutes of the State of Mississippi would result in depriving complainant of the full protection of the laws under Section 1 Amendment 14 of the Constitution of the United States, and would be an unlawful interference with interstate commerce, in violation of Section 3 of Article 8 of the Constitution of the United States.

(The arguments of counsel here followed, which were not reported.)

64 OPINION OF THE COURT.

It seems to me, gentlemen, to determine the question as to whether the plaintiff in this case was doing business in the State of Mississippi, it is only necessary to consider the immediate transaction before the Court.

It is admitted by the stipulations in this case that the contract of employment in this case was entered into in Mississippi; that the landholder whose land is alleged to have been contracted to be sold is a citizen of the state of Mississippi; that the entire transaction took place in Mississippi with a resident of Mississippi. That in itself seems to me beyond question to contitute doing business in Mississippi. But if we must proceed further than that, the stipulations would show that thousands of dollars worth of business had been done for years, that over a period of years numerous sales and transactions had taken place; that in an organization which sold land in Arkansas, Tennessee, Mississippi, Missouri and Kentucky, that some eight to ten percent of their business arose from transactions in Mississippi. Their agents came into Mississippi, they made contracts in Mississippi; they showed land in Mississippi; they made contracts for sales and consummated

sales here. That, in my judgment, is clearly doing business under the Mississippi law.

The case against the Memphis Publishing Company I do not think is in point at all with this case. In that case the Court was struggling with what proportion of an integrated business was done in Mississippi or without Mississippi. The Memphis Publishing Corporation is the publisher of a great newspaper. Their plant is without question located in the city of Memphis, where the newspaper is published. What the Court was trying to arrive at was whether they were doing business in this State by sending papers into it and having agents working there under it, not comparable to this at all, because this is merely a situation involving the sale of land and the entire transaction could be completed in Mississippi.

The sole question which remains to be determined in this case is whether or not under the Mississippi statute these contracts are void. There is no question that the Mississippi Legislature has a right to say that they might not use the Courts of the State of Mississippi to enforce them. They could not say that the Federal Courts would not take jurisdiction, but the mere effect of the statute is to say that Mississippi Courts may not assume jurisdiction. They have approached that problem, as I see it, in two ways. They have on certain occasions, as in the Marx & Bensdorf case and others, invoked one part of the statute and simply said you cannot use the Mississippi Courts to enforce this, and dismissed it on that ground. But in the Haygood case the Court approached the problem from a different angle, and in that case rather than to say that the Mississippi State Courts particularly cannot enforce these contracts, they went into what seems to me to be decision and not dicta, to the extent that they said these statutes made these contracts utterly void in his State and contrary to the public policy of the State. I could not personally agree that that is what the statute meant,

but I am bound by the decision of the Supreme Court of Mississippi as to what the Mississippi statutes mean, and the Federal Courts are bound by them. I think that was not dicta. The Court had a right to decide it on that point if they wanted to. I have not seen any decision of the Mississippi Supreme Court which has criticized the Haygood case, or in any way reversed the Haygood case. I think it is the law in Mississippi under the Haygood case that these contracts are void. Being void, there would be no right in this Court or any other Court to enforce them.

The motion to dismiss, or for a summary judgment, would be sustained.

Mr. Stone:
May we have an exception?

The Court:
Yes, sir.

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68 JUDGMENT

In the District Court of the United States for the Northern District of Mississippi, Western Division.

Interstate Realty Company, Complainant,
vs. No. 272 Civil.
J. S. Woods, Defendant.

This day this cause came on to be heard by agreement of the parties upon the Defendant's Motion for a Summary Judgment.

And the Court having considered the pleadings and admissions on file herein, and having heard the arguments

of counsel for the respective parties, and being of the opinion that said motion is well taken and should be sustained.

It is therefore hereby ordered and adjudged that said motion be and the same is hereby sustained; that the Second Amended Complaint herein be and the same is hereby finally dismissed with prejudice; and the Complainant, Interstate Realty Company, be and it is hereby taxed with all costs herein for which let execution issue.

Thus ordered and adjudged on this the 15th day of December, 1947.

(Signed) ALLEN COX,
Judge.

Ent. C O B-3, P-411.

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69 NOTICE OF APPEAL.

In the District Court of the United States for the Western Division of the Northern District of Mississippi.

Interstate Realty Company, Complainant

vs. No. 272-Civil.

J. S. Woods, Defendant.

Notice is hereby given that Interstate Realty Company, Complainant, hereby appeals to the Circuit Court of Ap-

Sealed and delivered in the presence of—

(Seal) INTERSTATE REALTY COMPANY.
(Signed) By PHIL STONE,
(Seal) Attorney.
(Seal) UNITED STATES FIDELITY AND GUARANTY COMPANY
(Signed) By CHAS. H. JOHNSTON,
(Charles H. Johnston)
Attorney-in-fact.

Filed this 6 day of Jan. 1948.

MOTION FOR EXTENSION OF TIME TO COMPLETE RECORD.

78 (Title Omitted.)

To Honorable Allen Cox, United States District Judge:

Comes Interstate Realty Company and requests an extension of time for the purpose of completing the Record on Appeal in this case and for grounds of said Motion says that the Court Reporter has been busy in reporting cases in this Court and has thus not been able to entirely complete the record in this case.

Respectfully submitted,
JAMES STONE & SONS,
(Sgd.) By PHIL STONE,
Attorneys for Complainant.

Oxford, Mississippi.

Certificate.

I, Phil Stone, of Counsel for Complainant, hereby certify that I have this day mailed, postage prepaid, a true copy of the foregoing Motion to Honorable John W. Kyle, Sardis, Mississippi; and to McClure & Fant, Sardis, Mississippi, Attorneys for Defendant, their usual post office addresses.

I further certify that said Attorneys for Defendant have no objection to the granting of said Motion.

Witness my signature at Oxford, Mississippi, this January 20, 1948.

JAMES STONE & SONS,
(Sgd.) By PHIL STONE,
(Phil Stone)
Of Counsel for Complainant.

Oxford, Mississippi.

Filed this 20 day of Jan. 1948.

ORDER GRANTING EXTENSION OF TIME FOR COMPLETION OF RECORD.

79 (Title Omitted.)

This day this cause came on to be heard upon the Motion of Complainant for extension of time in order to complete the Record in the above case, and it is hereby ordered that said time for completion of said Record be, and the same hereby is, extended until February 7, 1948.

Ordered and Adjudged this January 20, 1948.

(Sgd.) ALLEN COX,
U. S. District Judge.

Civ. O. B. #3-O-425.

peals for the Fifth Circuit from the Final Judgment entered in this action on December 15, 1947.

(Signed) L. C. ANDREWS,
(L. C. Andrews)

Oxford, Mississippi.

JAMES STONE & SONS,
(Signed) By PHIL STONE,
(Phil Stone)
Attorneys for Complainant.

Oxford, Mississippi.

Certificate.

I, Phil Stone, of Counsel for Complainant, do hereby certify that I have this day mailed to McClure and Fant, of Counsel for Defendant, a true copy of the above Notice of Appeal, postage prepaid, to their usual Post Office Address at Sardis, Mississippi.

This December 29, 1947.

(Signed) PHIL STONE,
(Phil Stone)
Of Counsel for Complainant.

Oxford, Mississippi.

Filed this 29 day of Dec. 1947.

STIPULATION FOR RECORD

(Title Omitted.)

It is hereby agreed by and between Attorneys for the Complainant and Attorneys for the Defendant that the Record on appeal shall consist of the following:

1. Second Amended Complaint, including all exhibits.

2. Answer of Defendant to Second Amended Complaint.

3. Request of Defendant for Admissions.

4. Reply of Complainant thereto.

5. Motion of Defendant for Summary Judgment.

6. Answer of Complainant thereto.

7. Opinion of the Court rendered December 15th, 1947, together with exceptions of Complainant thereto.

8. Order of Court dated December 15th, 1947.

9. Notice of Appeal.

10. Stipulation for Record.

11. Appeal Bond.

12. Certificate of U. S. District Clerk.

Witness the signatures of L. C. Andrews and James Stone & Sons, Attorneys for Complainant, this December 29, 1947.

(Signed) L. C. ANDREWS,
(L. C. Andrews)

Oxford, Mississippi.

JAMES STONE & SONS,
(Signed) By PHIL STONE,
(Phil Stone)
Attorneys for Complainant.

Oxford, Mississippi,

Witness the signatures of John W. Kyle and of McClure & Fant, Attorneys for Defendant, this December 31st, 1947.

(Signed) JOHN W. KYLE,
(John W. Kyle)

Sardis, Mississippi.

McCLURE & FANT,
(Signed) By HERBERT FANT,
(Herbert Fant)
Attorneys for Defendant.

Sardis, Mississippi.

Filed this 6 day of Jan. 1948.

72 BOND FOR COSTS.

(Title Omitted.)

Know All Men By These Presents; That Interstate Realty Company are held and firmly bound unto J. S. Woods, his executors, administrators, or assigns, in the sum of Five Hundred and no/100—dollars, lawful money of the United States of America, to be paid unto the said J. S. Wood, his executors, administrators, or assigns, to which payment well and truly to be made, we do bind and oblige our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seal and dated this 2nd day of January, A. D. 1948.

Whereas, the above-named Interstate Realty Company heretofore corporation of the State of Tennessee, commenced an action in the United States District Court, in and for the Northern District of Mississippi against the said J. S. Woods.

Now Therefore The Condition Of This Obligation is such that if the above-named Interstate Realty Company in the said action shall pay on demand, all costs that may be adjudged, or awarded against J. S. Wood as aforesaid in said action; then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

In the District Court of the United States for the Western Division of the Northern District of Mississippi.

I, HUBERT D. STEPHENS, Clerk of the United States District Court for the Western Division of the Northern District of Mississippi, do hereby certify that the foregoing 79 pages is a true and correct copy of portions of the record in the case of Interstate Realty Company, Complainant, vs. J. S. Woods, Defendant, stipulated by attorneys for the parties as the record in said cause on appeal thereof to the United States Circuit Court of Appeals, Fifth Circuit, together with the order of the District Judge extending time for filing the record on appeal.

Witness my signature and seal of office this 7th day of February, 1948.

(Seal)

HUBERT D. STEPHENS, JR.
Clerk, U.S. District Court.
By C. W. SMALLWOOD,
Deputy Clerk.

[fol. 81] That thereafter the following proceedings were had in said cause in the United States Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of May 24th, 1948

No. 12,255

INTERSTATE REALTY COMPANY

versus

J. S. WOODS

On this day this cause was called, and upon the request of counsel for appellant, the case was taken under submission upon the record and briefs filed, without oral argument.

[fol. 82] OPINION—Filed June 18, 1948

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12255.

INTERSTATE REALTY COMPANY, Appellant,

versus

J. S. WOODS, Appellee

Appeal from the District Court of the United States for the Northern District of Mississippi

(June 18, 1948)

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

Lee, Circuit Judge: This suit was filed by the appellant, a Tennessee corporation, to recover from appellee, a resident of Mississippi, a broker's commission alleged to be due on the sale of certain of appellee's real estate in the State of Mississippi. Appellee in his answer denied the right of appellant to recover, setting up that appellant was a

foreign corporation which, because it had never qualified to [fol. 83] do business in the State of Mississippi as provided by Mississippi law,[1] was not entitled to maintain any suit in any court in Mississippi. After filing his answer, the appellee called upon appellant to admit, pursuant to Rule 36, *Federal Rules of Civil Procedure*, that it had not qualified to do business in Mississippi. In response, appellant denied that it was doing business in Mississippi, but admitted a number of transactions in that State over a specified period of years. Upon this admission, the court below, on motion for summary judgment, found that appellant was doing business in Mississippi and held that the contract in question was void. Judgment was thereupon entered dismissing the plaintiff's suit with prejudice. This appeal followed.

The two questions involved are (1) Was appellant doing business in Mississippi within the purview of the statutes? And, (2) if so, was the contract with appellee which was entered into in Mississippi null and void because appellant at that time had not qualified to do business in Mississippi?

The record shows that appellant is a corporation organized under the laws of the State of Tennessee, with its domicile in Memphis, Tenn., and that it had never qualified to do business in Mississippi. Through its agents, however, it had contracted to sell real estate in Mississippi and in connection with sales had sent its agents into Mississippi to meet prospective buyers and to show the properties to be sold. Appellant admitted that in 1942 it earned from 3 sales in Mississippi $2,121.45; in 1943, from 2 sales, $4,064.25; in 1944, from 3 sales, $12,000; in 1945, [fol. 84] from 14 sales, $14,272.27; and in 1946, from 16 sales, $14,430.75. We think that in view of these admissions the court below was correct in holding that appellant was doing business in Mississippi within the meaning of the Mississippi statutes. *Marx & Bensdorf, Inc. v. First Joint Stock Land Bank of New Orleans*, 178 Miss. 345, 173 So. 297; *Wiley Electric Company v. Electric Storage Battery Company*, 167 Miss. 842, 147 So. 773.

The question remaining is whether or not appellant's failure to qualify to do business in Mississippi struck

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[1] Sections 5319, 5339, 5343, Mississippi Code 1942; Section 155, c. 137, Mississippi Laws 1944.

with nullity the contract sued upon in this case. The pertinent sections of the Mississippi law are set forth in the margin.[2]

[fol. 85] The court below rested its decision upon *Quartette Music Co. v. Haygood*, 108 Miss. 755, 67 So. 211, and held that under that case the contract here sued upon was null and void because at the time of contracting the appellant had not qualified to do business in the State of Mississippi. In so holding we think the court erred.

In the *Haygood* case the plaintiff was a Texas corporation and brought suit in the Circuit Court of Lee County, Miss., against J. L. Haygood and G. W. Long on a promissory note signed by them in the sum of $225. The defendants moved to dismiss, setting forth that the plaintiff was a foreign corporation and had not qualified to do business in Mississippi and that the note sued upon was the consideration for business done by the corporation in Mississippi.

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[2] "§5319. *Resident agent: how designated.*— * * *

"Every foreign corporation doing business in the state of Mississippi whether it has been domesticated or simply authorized to do business within the state of Mississippi, shall *file a written power of attorney* designating the secretary of state or in lieu thereof an agent as above provided in this section, upon whom service of process may be had in the event of any suit against said corporation; and any foreign corporation doing business in the state of Mississippi shall file such written power of attorney before it shall be domesticated or authorized to do business in this state, and the secretary of state shall be allowed such fees therefor as is [sic] herein provided for designating resident agents. Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of this state." (Emphasis ours.)

"§5339. *Foreign corporations may be domesticated.*— Every company or corporation incorporated under the laws of any other state, territory or country, now doing business in this state, or hereafter desiring to do business in this state, and desiring to become a domestic corporation in this state, may file with the governor of the state a copy of its charter, or articles of incorporation or association, or in case such company or corporation is incorporated merely by

Plaintiff demurred to the plea on the ground that the law referred to was unconstitutional and that the plea did not state sufficient grounds for a dismissal. The trial court overruled the demurrer and dismissed the plaintiff's suit, and the plaintiff appealed. The Supreme Court affirmed and, citing an earlier Mississippi case, said:

> "'Every contract made for, or about, any matter or thing which is prohibited and made unlawful by any statute, is a void contract, though the statute itself [fol. 86] does not mention that it shall be so, but only inflicts a penalty on the defaulter, because a penalty implies a prohibition, though there are no prohibitory words in the statute.'
>
> "There are some decisions in our books which apparently conflict with this rule, but they were all

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a certificate, then a copy of its certificate of incorporation, duly authenticated and certified under the great seal of the state in which it was incorporated by charter or certificate."

"§5343. *Charters to be filed.*—Every company or corporation for profit incorporated under or by virtue of the laws of any government, or of any other state or territory now or hereafter doing business in this state, shall file in the office of the secretary a copy of its charter or articles of incorporation, or in case such company or corporation is incorporated merely by certificate, then a copy of such certificate duly certified and authenticated. Said charters, articles of incorporation or certificates to be filed shall be duly certified by the president and secretary, or other chief executive of such corporation, and by attaching thereto the corporate seal, and the secretary of state, on the payment of the fees herein provided for shall give certificate that said corporation has filed its charter or articles of incorporation as required by this act, and any foreign corporation which shall not file a copy of its charter or certificate or articles of incorporation, as provided in this act, *shall be liable to a fine of not less than $100.00.* This section shall not apply to insurance companies, and is not to be taken or construed to change or modify the laws which are directly applicable to the character of corporations." (Emphasis ours.)

Section 155, c. 137, Mississippi Laws 1944, deals with local privilege taxes.

overruled by Woodson v. Hopkins, 85 Miss. 171, 37 So. 1000, 38 So. 298, 70 L. R. A. 645, 107 Am. St. Rep. 275."

The latest case called to our attention from the Mississippi Supreme Court on the subject is *Newell Construction Co. v. State Highway Commission*, 195 Miss. 395, 15 So. 2d 700. There the court said:

> "We are of the opinion that the court below was correct in holding that the appellant was doing business in this state and that there had been no substantial compliance with the statutes here involved until September 16, 1933, and that hence *the contract sued on is void and unenforcible.* Quartette Music Co. v. Haygood, 108 Miss. 755, 67 So. 211; Peterman Construction & Supply Company v. Blumenfeld, 156 Miss. 55, 125 So. 548; Wiley Electric Company v. Electric Storage Battery Company, 167 Miss. 842, 147 So. 773; Marx & Bensdorf, Inc. v. First Joint Stock Land Bank of New Orleans, 178 Miss. 345, 173 So. 297; Case v. Mills Novelty Company, 187 Miss. 673, 193 So. 625, 126 A. L. R. 1102." (Emphasis ours.)

Whether the court in using the word "void" meant absolutely null, or void in the sense of unenforceable, the opinion does not make clear. Citation of the *Haygood* case would indicate that the court was of the opinion that [fol. 87] the contract was absolutely null; but citation of the other cases, all of them opinions by the Supreme Court of Mississippi later in date than the *Haygood* case, would indicate that the court meant that the contract was "void" only in the sense that it was unenforceable[3] in the Mississippi courts.

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[3] The word "void" does not always imply entire nullity. In Black's *Law Dictionary*, 3rd ed., it is said: "Void seldom implies entire nullity; but is, in a legal sense, subject to large qualifications in view of all the circumstances calling for its application, and the rights and interests to be affected in a given case. [Citing cases.]"

In *Peterman Construction & Supply Co. v. Blumenfeld, supra*, the Supreme Court of Mississippi said:

> "* * * we think the case is controlled by Quartette Music Co. v. Haygood, supra, in which it is said that a contract made without first complying with the provisions of the above quoted statute could not be enforced in the courts of this state.
>
> "That is the policy of this state, and while this case appears to be hard, in that finally the foreign corporation did comply with the law, yet in so far as it affects this contract the compliance cannot be made to relate back to the date of its execution. It was either enforceable on the date of its execution, or unenforceable. Under the statute, as construed by this court, the contract was not enforceable on its execution, and when the one contract was signed it was, in effect, a volume of business already transacted amounting to 200 separate and distinct contracts, in so far as the relation created between the foreign corporation and the several subscribers is concerned. * * *"

[fol. 88] In *Wiley Electric Co. v. Electric Storage Battery Co., supra*, the Supreme Court of Mississippi said:

> "* * * This statute closes the doors of the courts of this state to foreign corporations doing business in this state in violation of its provisions, consequently upon the proof in this record we think the suit should have been dismissed."

In *Marx & Bensdorf, Inc. v. First Joint Stock Land Bank, supra*, the Supreme Court of Mississippi in referring to the statute used the following language:

> "* * * It will be noted that the last clause of that paragraph provides that any foreign corporation failing to comply therewith is barred from bringing and maintaining any suit in the courts of this state."

In *Case v. Mills Novelty Co., supra*, the Supreme Court of Mississippi said:

> "The servicing of this ice cream dispenser was purely a local transaction, not incidental to or necessary for the formation of the sales contract, and was

subject wholly to the supervision and control of the state. It necessarily follows therefore that when servicing this ice cream dispenser, which it did through an agent employed for that purpose, the appellee was doing business in this state, and the contract of which this service agreement is a part violated Section 4164, Code of 1930, and is unenforceable."

We think the cases cited in the *Newell Construction Co.* case, with the exception of the *Haygood* case, all indicate that under the Mississippi statutes the prohibition merely [fol. 89] closes the door of the State courts to a foreign corporation which has failed to qualify to do business in that State. That this is the true interpretation of the Mississippi law is made clear in *Long Beach Canning Co. v. Clark*, 1926, 141 Miss. 177, 106 So. 646, and *Citizens' Bank of Hattiesburg v. Grigsby*, 1934, 170 Miss. 655, 155 So. 684. In *Long Beach Canning Co. v. Clark, supra*, the Supreme Court of Mississppi said:

"* * * In Quartette Music Co. v. Haygood, 108 Miss. 755, 67 So. 211, it was held that a foreign corporation doing business in this state, which had not filed its charter as required by this section, could not enforce its obligations in the courts of this state.

* * * * * * * * * * * *

"The statute does not make a forfeiture of property to the state for the failure to record its charter. It simply refuses the aid of its courts to those doing business in violation of the law without recording their charter."

In *Citizens' Bank of Hattiesburg v. Grigsby, supra*, the Mississippi Supreme Court said:

"It is next contended that the contract was void, and that no validity can be given to the deed under the foreclosure. It will be noted, in considering this contention, that the Franklin Bond & Mortgage Company is not a party to the suit, is seeking no relief in court, and has sought none. The statute bearing on the matter denies, to a corporation violating the statute, access to the courts for any relief. We do not

think the statute avoids the contract so as to affect [fol. 90] third persons, and we are of the opinion that nobody can raise this question but the state of Mississippi, when suit is brought by third persons, or when the litigation is between other persons than the corporation violating the statute and the state of Mississippi. In other words, a sale under a deed of trust in pais passes the title from the trustee to the purchaser. In the original contract between the Franklin Bond & Mortgage Company and Williams, the title passed from Williams to the trustee. The language of the statute does not make the contract entirely void. See Middleton v. Georgetown Mercantile Company, 117 Miss. 134, 77 So. 956; Long Beach Canning Company v. Clark, 141 Miss. 177, 106 So. 646; Nicholson v. Myres (Miss.) 154 So. 282; Quitman County v. Stritze, 70 Miss. 320, 13 So. 36; and the authorities cited under these cases. See, also, Springfield Grocery Co. v. Devitt, 126 Miss. 169, 88 So. 497.

"In our opinion, the case of Long Beach Canning Co. v. Clark, supra, is applicable here. In that case it was held, where a foreign corporation did business in this state without filing its charter as required by section 935, Code 1906 (which is brought forward in the Code of 1930, section 4164), that this did not prevent it from selling property to liquidate its affairs on discontinuing its business, and that the statute prohibiting a foreign corporation from transacting business unless its charter was filed was intended only to deny such foreign corporation access to the courts of the state to enforce rights growing out of business transacted contrary to the statute. It would be too sweeping a decision to hold that the contract was utterly void as to third persons, and it would impose an un- [fol. 91] reasonable burden on other parties to compel them to see to it that a corporation had complied with the law of the state, when they desired to buy the property of such corporations."

When, therefore, the court in the *Newell* case used the words "void and unenforcible," we must interpret "void" as meaning that no relief could be granted to a noncomplying foreign corporation in view of the statute. Sup-

posing a Mississippi resident had sued a nonresident corporation in the Mississippi court for breach of contract, the contract having been entered into in Mississippi, would it be contended that the nonresident corporation could set up that since it had not qualified to do business in the State of Mississippi the contract entered into was void? We think not. The Mississippi statutes deny to the noncomplying corporation permission to bring a suit in the State courts; but they do not prevent such a corporation from being sued upon its contracts in the State courts.[4]

But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the federal courts. If diversity of citizenship exists, the fact that a foreign corporation may not sue in the State courts because it has not complied with the conditions of doing business within the State does not shut the doors of the federal court sitting in that State. See *David Lupton's Sons Co. v.* [fol. 92] *Automobile Club of America,*[5] 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177; *McLean v. York Oil Field Supply Co., Inc.*, 5 CCA, 138 F. 2d 804; *Butler Bros. Shoe Co. v. U. S. Rubber Co.*, 156 F. 1; *Groton Bridge & Mfg. Co. v. Amer. Bridge Co.*, 151 F. 871, 876-877.

We therefore hold that the appellant has the right to sue on its contract in the federal District Court sitting in Mississippi.

The judgment appealed from is

Reversed.

A True copy. Test:

——— ———, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

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[4] The statute reads: "Any foreign corporation failing to comply with the above provisions shall not be permitted to bring or maintain any action or suit in any of the courts of the state." See *Citizens' Bank v. Grigsby, supra.*

[5] This case is almost on all fours with the one now before the court and went up on the question of whether the New York law (which is like the Mississippi law) made the contract void or only unenforceable. Held: Unenforceable, hence the federal court had jurisdiction.

[fol. 93]

JUDGMENT

Extract from the Minutes of June 18th, 1948

No. 12,259

INTERSTATE REALTY COMPANY

versus

J. S. WOODS

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Mississippi, and was taken under submission by the Court on the record and briefs on file;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby reversed;

It is further ordered and adjudged that the appellee, J. S. Woods, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

[fols. 94-99] PETITION FOR REHEARING—Filed 9/24/48

UNITED STATES CIRCUIT COURT OF APPEALS,
FIFTH CIRCUIT.

No. 12,259.

INTERSTATE REALTY COMPANY,
Appellant,

versus

J. S. WOODS,
Appellee.

PETITION FOR REHEARING BY APPELLEE.

Comes J. S. Woods, appellee in the above entitled case, and shows unto the court that upon the 18th day of June, 1948, this court rendered a judgment reversing the judgment rendered in the District Court of the United States for the Northern District of Mississippi, dismissing the suit of Interstate Realty Company v. J. S. Woods to recover a broker's commission. The case is reported "*Interstate Realty Co. v. Woods*", 168 Fed. (2d) 701. The appellant was a foreign corporation, which, according to

the decision of this court, was transacting business in the State of Mississippi without qualifying. This court held that since the contract sued upon was not absolutely void, it was merely unenforceable in the State Court, but by reason of diversity of citizenship the suit might be maintained in the Federal Court. Accordingly, the court reversed the decision of the District Court and held that suit might be maintained in the United States District Court, using the following language:

> "But the prohibition in the State law closing the doors of the State courts extends no further than the State courts. The State of Mississippi is without authority to limit or extend the jurisdiction of the federal courts. If diversity of citizenship exists, the fact that a foreign corporation may not sue in the State courts because it has not complied with the conditions of doing business within the State does not shut the doors of the federal court sitting in that State. See David Lupton's Sons Co. v. Automobile Club of America, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, Ann. Cas. 1914A, 699; McLean v. York Oil Field Supply Co., Inc., 5 Cir. 138 F. 2d 804; Butler Bros. Shoe Co. v. U. S. Rubber Co., 8 Cir., 156 F. 1; Groton Bridge & Mfg. Co. v. Amer. Bridge Co., C. C. N. Y., 151 F. 871, 876, 877.
>
> "We therefore hold that the appellant has the right to sue on its contract in the federal District Court sitting in Mississippi.
>
> "The judgment appealed from is reversed."

The decision of this court was based upon the case of *David Lupton's Sons Co. v. Automobile Club of America*, 225 U. S. 489, 56 L. Ed. 1177. Appellee's counsel inad-

vertently failed to call the attention of the court to the fact that the *David Lupton* case was overruled by the Supreme Court of the United States in the case of *Dr. Furman Angel v. W. H. Bullington*, 330 U. S. 183, 91 L. Ed. 832. In that case a North Carolina statute prohibited a suit for recovery on a deficiency judgment. A suit filed in the state court thereupon was dismissed, whereupon, the plaintiff filed suit in the United States District Court upon the theory that the contract was not void but that the same was merely unenforceable in a North Carolina Court. The appellant, plaintiff, based its right to recover in the Federal Court on diversity of citizenship, relying upon the *Lupton* case. The Supreme Court of the United States held, in the last mentioned case, that no suit could be maintained in the Federal Court based upon diversity of citizenship, unless the suit could be maintained in the State Court, and in doing so, overruled the *Lupton* case. The court used the following language:

> "Cases Like David Lupton's Sons Co. v. Automobile Club, 225 U. S. 489, 56 L. ed. 1177, 32 S. Ct. 711, Ann. Cas. 1914A 699, are obsolete insofar as they are based on a view of diversity jurisdiction which came to an end with Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487. That decision drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts or were barred by defenses controlling in the State courts. Compare Suydam v. Broadnax, 14 Pet. (US) 67, 75, 10 L. ed. 357, 361. Of course, where resort is had to a federal court not on grounds of diversity of citizenship but because a federal right is claimed, the limitations upon the courts of a State do not con-

trol a federal court sitting in the State. Holmberg v. Armbrecht, 327 U. S. 392, 90 L. ed. 743, 66 S. Ct. 582, 162 A. L. R. 719."

Mr. Justice Rutledge, in his dissenting opinion, conceded that the decision of the court had the effect of overruling the *Lupton* case. The court used the following language:

"From the Court's opinion I cannot say whether the question has been resolved. Its discussion of North Carolina's 'policy' and its overruling of the David Lupton's Sons Case (US) supra, would seem to indicate that it is applying York, though without saying so frankly. But, if so, why speak also of res adjudicata? The law should not be made into such a merry-go-round. Bullington is entitled to one full day in court on the substance of his claim. This he has not had."

The doctrine announced in the case of *Angel v. Bullington* rests upon the rule announced in the case of *Erie R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, 114 A. L. R. 1487, and the case of *Guaranty Trust Company of New York v. York*, 326 U. S. 99, 160 A. L. R. 1231, from which cases it, necessarily, appears that the decision of this court in the instant case was erroneous and a rehearing should be granted.

Counsel for the appellee may be excused for not citing the *Angel* case because the published volume of L. Ed. of the Supreme Court of the United States, used by lawyers in Mississippi, had not been published and the decision could only have been obtained from the Advance Sheets,

and we take it that it is pardonable for counsel practicing law in Mississippi to fail to read each and every Advance Sheet by the Supreme Court of the United States.

Unless the court should grant a rehearing and set the judgment aside, affirming the judgment of the District Court, it will be necessary to go to the inconvenience, trouble and expense of trying the case on the merits before the District Judge, in a case where, admittedly, the United States District Court of the Northern District of Mississippi was and is without jurisdiction.

Wherefore, the appellee moves the court to set aside the judgment of reversal rendered in this case, as aforesaid, and render a judgment of affirmance.

JOHN W. KYLE,
Sardis, Mississippi,

JAMES McCLURE,
Sardis, Mississippi,

WILLIAM H. WATKINS,
Jackson, Mississippi,

P. H. EAGER, JR.,
Jackson, Mississippi,

THOMAS H. WATKINS,
Jackson, Mississippi,
Attorneys for Appellee.

I, William H. Watkins, of counsel for appellee in the above entitled case, certify that I have this day sent by United States Mail, postage prepaid, to L. C. Andrews, Oxford, Mississippi, and James Stone & Sons, Oxford, Mississippi, attorneys for appellant in the above entitled case, a true and correct copy of the foregoing petition for rehearing.

This, the 22nd day of September, 1948.

WILLIAM H. WATKINS,
Of Counsel.

[fol. 100] ORDER GRANTING APPELLEE LEAVE TO FILE A PETITION FOR REHEARING

Extract from the Minutes of September 29th, 1948

No. 12,259

INTERSTATE REALTY COMPANY

versus

J. S. WOODS

Under direction of Honorable Elmo P. Lee, United States Circuit Judge, acting pursuant to Rule 29 of this Court, it is ordered that appellee be, and he is hereby granted leave to file a petition for rehearing as of September 24, 1948, in the above entitled and numbered cause.

[fol. 101] ORDER GRANTING LEAVE TO FILE PETITION FOR REHEARING—Filed October 22, 1948

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12,259

INTERSTATE REALTY COMPANY, Appellant,

versus

J. S. WOODS, Appellee

Appeal from the District Court of the United States for the Northern District of Mississippi

(October 22, 1948)

On Petition for Rehearing

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

PER CURIAM:

A rehearing is granted restricted to the question whether, in a diversity case, the doors of the federal court sitting in Mississippi are shut to a foreign corporation which may

not sue in the state court because it has not complied with the condition for doing business within the state, the rehearing to be submitted upon briefs previously filed and to be filed on or before November 15, 1948.

[fol. 102] OPINION AND DECREE REAFFIRMED, ON REHEARING NOVEMBER 26, 1948

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 12259

INTERSTATE REALTY COMPANY, Appellant,

versus

J. S. WOODS, Appellee

Appeal from the District Court of the United States for the Northern District of Mississippi

(November 26, 1948)

On Rehearing

Before Sibley and Lee, Circuit Judges, and Christenberry, District Judge

Per CURIAM:

In our original opinion we held that the contract sued upon was not absolutely void but merely unenforceable in the State court and that by reason of diversity of citizenship the suit may be maintained in the federal court. On appli- [fol. 103] cation for rehearing, the appellee cited the case of *Angel v. Bullington*, 330 U. S. 183, as overruling the case of *David Lupton's Sons Co. vs. Automobile Club of America*, 225 U. S. 489, 32 S. Ct. 711, 56 L. Ed. 1177, upon which reliance was placed by us to sustain jurisdiction in the federal court. Accordingly, we granted a rehearing, restricted in its application to the question whether a foreign corporation might sue in the federal court when the doors of the State courts were closed to it because it had not complied with the conditions for doing business within the State.

The Supreme Court in the *Bullington* case was concerned with the application of the doctrine of *res adjudicata* under a North Carolina statute prohibiting a suit for recovery on a deficiency judgment. What was said in that case about cases like *David Lupton's Sons Co. v. Automobile Club* was argumentatory. We do not consider it to have overruled the *David Lupton's Sons Co.* case upon the question with which we are now concerned and with respect to which the *David Lupton's Sons Co.* case expressly dealt.

Entertaining as we do this view, our original opinion and decree reversing the judgment appealed from are reaffirmed in their entirety and made the judgment of the court on rehearing.

A True copy. Tehste:

—— ——, Clerk of the United States Court of Appeals for the Fifth Circuit.

[fol. 104] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 105] Supreme Court of the United States

Order Allowing Certiorari—Filed February 7, 1949

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.